In the
United States Court of Appeals
For the Seventh Circuit

No. 11830

OTTO EISENSCHIML, Plaintiff-Appellant, vs. FAWCETT PUBLICATIONS, INC. Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. — Honorable Philip L. Sullivan, District Judge.

APPENDIX TO APPELLANT'S BRIEF.

ELMER GERTZ and IRWIN S. BASKES
Attorneys for Plaintiff-Appellant
120 South LaSalle Street
Chicago 3, Illinois

October 26, 1956

The Scheffer Press, Inc.—ANdover 3-6850

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IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

OTTO EISENSCHIML,
Plaintiff,
vs.
FAWCETT PUBLICATIONS, INC.,
a Delaware Corporation,
Defendant.

Civil Calendar
53 C 1912

No. 11830

DOCKET ENTRIES
JUDGE SULLIVAN

Basis of action: Copyright — Not less than $150,000.00 & Injunc.

Attorneys

For Plaintiff-Appellant: Elmer Gertz and Irwin S. Baskes, 120 S. La Salle St., Chicago 1. RA 6-6116.

For Defendant: A. L. Hodson, Howard Ellis, J. B. Martineau, Don H. Reuben of Kirkland, Fleming, Green, Martin and Ellis, Prudential Plaza, 130 E. Randolph, Chicago 1.

Joseph A. Graber, Master, 7012 South Shore Drive.

Date, 9/16/53; Plaintiff's account, EG Dep Sept. report; received 15.00.

Date, Oct. 20, 1953; disbursed 15.00.

Date, 5/22/56; Plaintiff's account, EG, Appeal; received 5.00

Date, 5/24/56; Plaintiff's account, Treas CD 3 13; disbursed 5.00.

Date	Filings—Proceedings	
9/16/53	Filed complt. & copy — 4 pp. (JS5)	15.00
9/16/53	Iss. summons & copy — copy of complt. att. rw.	
10/ 2/53	Filed appearance of deft and attys (1) d	
10/ 5/53	Filed summons retd served 2.40 H	

11/ 9/53 Filed Notice and Answer. (4)
11/ 9/53 Filed Stipulation. (1) H
12/14/53 Leave to pltf. to file inst. motion for summary judgment and supporting affidavits, etc. Deft. to file counter-affidavits by Jan. 4, 1954, and said motion taken under rule 7—Draft—Barnes, J. (1) Mld. notices 12/15/53.
12/14/53 Filed Notice, Motion for Summary Judgment and Affidavit of pltf. in support of his motion for summary judgment. (13) P
1/12/54 Filed Plaintiff's Brief In Support Of His Motion For Summary Judgment. (5) d
1/21/54 Filed Notice and Brief in answer to pltf's brief. (2) H
1/28/54 Filed Notice and Affidavit of Joseph Millard. (1) (2) d
1/27/54 Filed Notice and Pltf's reply brief in support of his motion for summary judgment. (6) P
2/11/54 Pre trial conf held and motion of pltff for a summary judgmt is denied. By agreement order cause referred to Special Master James O'Shaughnessy of 10 S. LaSalle St., Chgo., Ill. Sullivan, J.
2/11/54 Mailed C.C. of order of 2/11/54 to Master. Mld ntcs 2/12/54. d
2/15/54 Filed Notice. (2)
2/15/54 On motion of deft. enter order vacating order referring this cause to Master James B. O'Shaughnessy — Sullivan, J. Mld. notices 2/15/54. P
2/25/54 Filed Notice and Deft's. response to pltf's. request for admissions. (8) P
3/ 1/54 Filed Notice and Deft's Answers to Interrogatories. (1) (4) d
3/ 8/54 Filed Notice and Deft's Response to Pltff's Request for Admissions. (1) (2) d

9/20/54 Filed Notice.
9/20/54 Filed Petition.
9/20/54 Order cause referred to Master in Chancery Joseph A. Graber. — Sullivan, J.
Mld ntcs 9/21/54. H
9/21/54 Mld c.c. of order to Master. tb
10/ 5/54 Filed Notice and deft's response to pltf's request for addtl admsns. (5) h
10/28/54 Filed Deposition of Joseph Millard & Ralph F. Daigh. d
11/22/54 Filed Stipulation and Interrogatories propounded by pltf and cross-interrogs. (8)
12/ 3/54 Filed deposition of Mrs. Joseph J. Millard. H
3/ 3/55 Filed Oath of Master Joseph A. Graber. t
12/28/55 Fld Special Master's Report. (30,2)
Mld notices to attys of record with copy of report. t
1/ 4/56 Filed Notice and Exceptions of Plaintiff to Special Masters Report. (2) (11) a
1/ 4/56 Filed Plaintiffs Suggested Findings of Fact. (106) a
1/ 4/56 Filed All of the Exhibits Listed in Paragraph 5 of Objections to Special Masters Report. a
1/ 9/56 Fld Pltffs brief in support of his exceptions to special master's report. jk
12/28/55 Filed Pltf's exhibits (large brown envelope).
12/28/55 Filed transcript of proceedings had before Special Master (5 vols, 2550 Pgs) (filed in Exhibit Drawer 31).
1/20/56 Filed Special Masters' Final Report.
Mld. Attorneys record notice and copy of report 1/29/56. a
1/24/56 Filed Notice of Filing Objections to the Special Master's Final Report. (2) a
1/24/56 Filed Exceptions of Plaintiff to Special Master's Final Report. (3) a

1/27/56 Filed Notice. (1)

1/27/56 Filed Notice & Ptff's additional brief in support of Exceptions to Spec. Master's "Final Report". wek

1/27/56 Plaintiff given 5 days from this date to file his brief in support of his motion objecting to Masters Report. Defendant given 30 days thereafter to file th ir brief in support of Master's report and Plaintiff given 15 days thereafter to file his Reply Brief and cause taken under advisement.—Sullivan J
Mailed notices 1/27/56. I

3/ 2/56 Fld brief in opposition to pltff's objections to Master's Report & in support of Master's Report & 3 copies. (21) t

4/26/56 Fld memorandum. (6) t

4/26/56 Master's Reports are confirmed in full and a re-reference will be made to the Master to determine the amount of attorneys fees. Filed memorandum opinion, Deft. to submit draft order on April 30, 1956 at 10 A.M. Sullivan—J.
Ntcs. mld. 4/26/56.

4/30/56 Enter order pur. to Court's ruling of 4/26/56. Draft Sullivan—J. (5)
Mld. ntcs. 5/1/56. t

5/ 2/56 Mld. C.C. of Order to Master Jos. A. Graber t

5/22/56 Filed Notice of Appeal of plaintiff.
(1) $5.00 pd.

5/22/56 Filed Cost bond on appeal. (1)

5/22/56 Mailed copy of notice of appeal to a'tys. for defendant and Master Graber. B

5/29/56 Filed Appellant's Statement of points (4)

5/29/56 Filed Appellant's Designation of contents of record on appeal. (4) B

6/ 4/56 Filed Notice of Motion. (2)
6/ 4/56 Filed Plaintiff's motion to stay proceedings. (2)
6/ 4/56 Proceedings stayed upon filing of supersedeas bond by the plaintiff.—Sullivan, J.
Mailed notice to Attys. 6/6/56.
6/ 5/56 Filed Notice, and Appellee's designation of additional portions of record of appeal. (4)
6/ 5/56 Supersedeas Bond in the sum of $7000.00 approved and filed.—Sullivan, J.
Mailed notice to Attys. 6/6/56.
6/ 5/56 Filed Supersedeas Bond. (2) B
5/17/56 Filed Change of Address. a
6/20/56 Clerk's File copy of Transcript of proceedings had on Feb. 11, Feb. 15, and Sept. 20, 1954, before the Honorable Philip L. Sullivan, District Judge. Filed by official court reporter. (14, 3 & 4) B
6/27/56 Filed Stipulation (1)
6/27/56 By stipulation time for filing the record on appeal and the docketing of this cause in U. S. Court of Appeals is extended to July 31, 1956.—Draft—Sullivan. J.
Mailed Notice to Attys. 6/27/56. B
6/28/56 Enter Order to suggest death of counsel for deft. J. B. Martineau and move for leave for A. L. Hodson to file his appearance as atty. for deft.—Sullivan, J.
Mailed notices. 7/2/56 I
6/28/56 Filed Notice of Motion. (2)
6/28/56 Filed Petition. (3)
6/28/56 Ordered that lv be and same is given to Joseph A. Graber, Spl Master to file partial satisfaction in the sum of $1500.00 for satisfaction in the sum of $1500.00 for payment received on account of his fees from pltff herein as ordered

by order of this Court entered 4/30/56. Sullivan, J. Draft (1) I
Mailed notices 7/2/56.

6/28/56 Filed Partial Satisfaction. (2) I

7/2/56 Filed appearance of addtl atty for deft. H

7/9/56 Filed Stipulation. (1)

7/9/56 On stipulation enter order that Clerk of the District Court prepare record on appeal under new Court of Appeals Rules — Draft —Hoffman, J. (1)
Mailed notice to attys. 7/9/56. B

7/19/56 Clerk's File Copy of Transcript of proceedings had before the Honorable Philip L. Sullivan, Judge, on June 28, 1956 filed by official court reporter. (6) B

1 STATEMENT UNDER RULE 10(b)
UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

1. This suit was commenced on September 16, 1953.

2. The plaintiff in said action was Otto Eisenschiml, and the defendant was Fawcett Publications, Inc., a Delaware corporation. No change in the original parties has taken place.

3. The pleadings in the said action were filed on the following dates:

(a) Complaint filed on September 16, 1953.

(b) Answer to complaint filed on November 9, 1953.

(c) Plaintiff's motion and affidavit for summary judgment filed December 14, 1953.

(d) Defendant's affidavit (by Joseph Millard) in opposition to plaintiff's motion and affidavit for summary judgment filed January 28, 1954.

(e) Plaintiff's request for admissions served on

defendant February 17, 1954, February 26, 1954 and
2 September 7, 1954, respectively.

(f) Defendant's response to plaintiff's request for admissions filed on February 25, 1954, March 8, 1954 and October 5, 1954, respectively.

(g) Plaintiff's interrogatories served on defendant on February 18, 1954.

(h) Defendant's answers to plaintiff's interrogatories filed on March 1, 1954.

(i) Depositions of Joseph Millard and Ralph Daigh, filed October 28, 1954.

(j) Deposition of Mrs. Joseph Millard, filed December 3, 1954.

4. There were no arrests, bail taken, or property attached.

5. (a) The cause was referred to Honorable Joseph A. Graber as Special Master, and a trial had before him on November 17, 1954 and on subsequent dates as set forth in the transcript of proceedings.

(b) The issue of damages and profits was reserved by stipulation of the parties recited into the transcript of proceedings.

(c) The Special Master filed his report on December 28, 1955, finding the issues in favor of the defendant and against the plaintiff, and recommending that the court enter judgment for the defendant
3 and tax all costs of the proceedings including attorneys fees against the plaintiff.

(d) The plaintiff filed his exceptions to the Special Master's report on January 4, 1956.

(e) Special Master filed his final report on January 20, 1956 overruling plaintiff's objections (with minor exceptions) and confirming his original report.

(f) Plaintiff filed his exception to the Special Master's final report on January 24, 1956.

6. (a) Special Master's reports were confirmed in full by Honorable Philip L. Sullivan in memorandum of decision filed April 26, 1956 and Clerk's memorandum of order entered April 26, 1956.

(b) Special Master's reports were confirmed in full by the Honorable Philip L. Sullivan by judgment order entered April 30, 1956.

7. Notice of appeal of plaintiff and appeal bond, both filed on May 22, 1956.

Dated: May 24, 1956.

Respectfully submitted,
Elmer Gertz and
Irwin S. Baskes
By Elmer Gertz

4 * * *

5 PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of April (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Six and of the Independence of the United States of America, the 180th Year.

Present:

Honorable John P. Barnes, Chief District Judge
Honorable William H. Holly, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Monday, April 30, 1956

Court met pursuant to adjournment

Present: Honorable Philip L. Sullivan, Trial Judge

6 COMPLAINT
(Filed Sept. 16, 1953)

The Plaintiff Alleges:

Plaintiff is a citizen of the State of Illinois and defendant is a corporation incorporated under the laws of the State of Delaware. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. The action arises under the Copyright Law of the United States, Title 17 of the United States Code, as codified and enacted unto law by the Act of July 30, 1947 (61 Stat. 652) and amended by the Act of April 27, 1948 (62 Stat. 202), the Act of June 25, 1948 (62 Stat. 869), the Act of June 3, 1949 (63 Stat. 1953), the Act of October 31, 1951 (65 Stat. 710) and the Act of July 17, 1952 (66 Stat. 752), and any other amendments thereto, and the Act of March 4, 1909, as amended.

COUNT I.

1. Prior to March 26, 1937, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled "Why Was Lincoln Murdered?".

2. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

3. Between March 26, 1937, and March 27, 1937, plaintiff complied in all respects with the Act of March 4,
7 1909, as amended, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of the book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 27, 1937, Class A, No. 104467."

4. Since March 26, 1937, the book has been published by plaintiff and all copies of it made by plaintiff or under

his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of March 4, 1909, as amended, and all other laws governing copyright.

8 5. Since March 26, 1937, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyright in said book.

6. After March 27, 1937, defendant infringed the copyright by publishing and placing upon the market a book entitled "America's Greatest Unsolved Murder", which was the principal feature of the February 1953 issue of "True", a magazine published by defendant and which was copied largely from plaintiff's copyrighted book, entitled "Why Was Lincoln Murdered?".

7. A copy of plaintiff's copyrighted book and a copy of defendant's infringing book and magazine will be produced at the trial of this cause and at such other time or times as shall be required by this court. Plaintiff has heretofore given defendant a copy of plaintiff's book.

8. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

Wherefore plaintiff demands that:

I. Defendant, its agents, and servants be enjoined during the pendency of this action and permanently from infringing the copyright of the plaintiff in any manner.

II. Defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of the copyright and to account and pay over to plaintiff all the gains, profits, and advantages derived by defendant from its infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than $150,000.00.

III. Defendant be required to deliver up to be impounded during the pendency of this action all copies in its possession or under its control infringing the copyright and to deliver up for destruction all infringing the copyright and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

9 IV. Defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

V. Plaintiff have such other and further relief as is just.

COUNT II.

1. Prior to September , 1940, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled "In the Shadow of Lincoln's Death".

2. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

3. Between September , 1940, and October 2, 1942, plaintiff complied in all respects with the Act of March 4, 1909, as amended, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of the book, and received from the Register of Copyrights a certificate of recording of assignment of copyright, from the original holder of the copyright, Wilfred Funk, Inc., dated and identified as follows: October 2, 1942, Class A, Book 492, page 112.

5. Since September 23, 1942, the book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity wtih the provisions of the Act of March 4, 1909, as amended, and all other laws governing copyright.

6. Since September 23, 1942, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyright in said book.

7. After September 23, 1942, defendant infringed the copyright by publishing and placing upon the market a book entitled "America's Greatest Unsolved Murder", which was the principal feature of the February 1953 issue of "True", a magazine published by defendant, and which was copied largely from plaintiff's copyrighted book, entitled "In the Shadow of Lincoln's Death".

8. A copy of plaintiff's copyrighted book and a copy of defendant's infringing book and magazine will be produced at the trial of this cause and at such other time or times as shall be required by this court. Plaintiff has heretofore given defendant a copy of plaintiff's book.

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

Wherefore plaintiff demands that:

I. Defendant, its agents, and servants be enjoined during the pendency of this action and permanently from infringing the copyright of the plaintiff in any manner.

II. Defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of the copyright and to account and pay over to plaintiff all the gains, profits, and advantages derived by defendant from its infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than $150,000.00.

III. Defendant be required to deliver up to be impounded during the pendency of this action all copies in its possession or under its control infringing the copyright and to deliver up for destruction all infringing the copyright and to deliver up for destruction all infringing

copies and all plates, molds, and other matter for making such infringing copies.

IV. Defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

V. Plaintiff have such other and further relief as is just.

/s/ Elmer Gertz
Attorney for Plaintiff

11 * * *

12 ANSWER
(Filed Nov. 9, 1953)

The defendant, Fawcett Publications, Inc., a Delaware corporation, by its attorneys, Howard Ellis, J. B. Martineau and Don H. Reuben, for answer to the plaintiff's complaint says:

For answer to the unnumbered paragraph of the plaintiff's complaint the defendant admits that it is a corporation incorporated under the laws of the State of Delaware, admits that this action arises under the copyright law of the United States, denies the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and does not have sufficient information nor belief to answer the allegation that the plaintiff is a citizen of the State of Illinois.

COUNT I

1. The defendant denies that the book entitled "Why Was Lincoln Murdered?" is an original work and has neither sufficient information nor belief to answer the remaining allegations of Paragraph 1 and demands strict proof thereof.

2. The defendant denies the allegations of Paragraph 2.

3. The defendant has neither sufficient information nor

belief to answer the allegations of Paragraph 3 of the complaint and demands strict proof thereof.

12A 4 and 5. The defendant has neither sufficient information nor belief to answer the allegations of Paragraphs 4 and 5 and demands strict proof thereof.

6. The defendant admits publishing an article entitled "America's Greatest Unsolved Murder" in its February 1953 issue of "True" magazine and denies all other allegations of Paragraph 6 of the complaint.

7. The defendant admits having received a copy of the book "Why Was Lincoln Murdered?" from the plaintiff.

8. The defendant admits receiving notification from the plaintiff that it has infringed an alleged copyright of plaintiff, but defendant denies any infringement whatsoever of any valid copyright the plaintiff might have.

COUNT II

1. The defendant denies that the book entitled "In The Shadow of Lincoln's Death" is an original work and has neither sufficient information nor belief to answer the remaining allegations of Paragraph 1 of Count II and demands strict proof thereof.

2. The defendant denies the allegations of Paragraph 2 of Count II.

3. The defendant has neither sufficient information nor belief to answer the allegations of Paragraph 3 of Count II of the complaint and demands strict proof thereof.

5. and 6. The defendant has neither sufficient information nor belief to answer the allegations of Paragraphs 5 and 6 of Count II and demands strict proof thereof.

7. The defendant admits publishing in its February 1953 issue of "True" magazine an article entitled "America's Greatest Unsolved Murder" and denies all other

allegations of Paragraph 7 of Count II of the complaint.

13 8. The defendant admits having received a copy of the book "In The Shadow of Lincoln's Death" from the plaintiff.

9. The defendant admits receiving notification from the plaintiff that it has infringed an alleged copyright of plaintiff, but defendant denies any infringment whatsoever of any valid copyright the plaintiff might have.

Wherefore, the defendant demands judgment dismissing the complaint herein together with costs and disbursements of this action.

14-15 * * *

16

PLAINTIFF'S EXHIBIT 7
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
(Filed Dec. 14, 1953)

Now comes Otto Eisenschiml, plaintiff herein, by Elmer Gertz, his attorney, and moves for summary judgment herein in his favor and against the defendant; and in support of such motion files herewith his affidavit, the exhibits thereto attached and the pleadings herein, and offers to produce the matters and things referred to in his affidavit, his two said copyrighted books referred to in his complaint, the certificates of copyright in connection therewith, and the infringing book or book-length article published by defendant and referred to in the complaint.

Alternatively, he prays for an interlocutory judgment on the merits, with the issue of the actual amount of his recovery reserved for further hearing.

Otto Eisenschiml, Plaintiff
Elmer Gertz, Attorney for Plaintiff

17

AFFIDAVIT OF PLAINTIFF IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

(Note: As hereinafter indicated in Appendix p. 180 in the testimony of plaintiff, he made certain corrections in this affidavit. The affidavit is here printed in the original form as filed.)

Otto Eisenschiml, plaintiff herein, being first duly sworn, on oath deposes and says that he has personal knowledge of the facts hereinafter set forth and that if sworn as a witness he could testify competently thereto. He further says that:

1. From birth he has been continuously, and now is, a citizen of the United States; and was, at the time of the filing of the complaint herein, a citizen of the State of Illinois. At each of the times mentioned in Counts I and II of the complaint he was a citizen of the United States.

2. Prior to March 26, 1937, he created and wrote an original book, entitled "Why Was Lincoln Murdered?" This book contains a large amount of material wholly original with him and is copyrightable subject matter under the laws of the United States.

3. Between March 26, 1937 and March 27, 1937, he complied in all respects with the Act of March 4, 1909, as amended, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of the book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 27, 1937, Class A, No. 104467."

18 4. Since March 26, 1937, the book has been published by him and all copies of it made by him or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of March 4, 1909, as amended, and all other laws governing copyright.

5. Since March 26, 1937, he has been and still is the sole proprietor of all rights, title and interest in and to the copyright in said book.

6. Prior to September, 1940, he created and wrote an original book, entitled "In The Shadow of Lincoln's Death." This book contains a large amount of material wholly original with him and is copyrightable subject matter under the laws of the United States.

7. Between September, 1940 and October 2, 1942, he complied in all respects with the Act of March 4, 1909, as amended, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of the book, and received from the Register of Copyrights a certificate of recording of assignment of copyright from the original holder of the copyright, dated and identified as follows: October 2, 1942, Class A, Book 492, page 112.

8. Since September 23, 1942, the book has been published by him and all copies of it made by him or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of March 4, 1909, as amended, and all other laws governing copyright.

9. Since September 23, 1942, he has been and still is the sole proprietor of all rights, title and interest in and to the copyright in said book.

10. The work affiant did on "Why Was Lincoln Murdered?" involved about 18 years and the expenditure of about $20,000.00, in addition to his own time. Some of the manuscripts, books, magazines and newspapers affiant had to acquire were very expensive and rare and their acquisition required extensive correspondence and research. For several years he paid wages to in-
19 vestigators in Washington, San Francisco, Macon, Ga., Burlington, Vermont, Chicago, and other places.

A special secretary worked for him for about three years, and two full-time assistants aided her for about one year prior to publication. Trips to various parts of the country cost additional money. The secretary and her mother, for example, were with him in Washington for some time, searching through the files of the Provost Marshal's office, and taking notes. The cash expenses for "In The Shadow of Lincoln's Death" amounted to about $3,000.00 in addition to his own time.

11. The defendant, Fawcett Publications, Inc., published in the July, 1947 issue of its magazine, "True", a book or book-length article, entitled "The Devil's Errand Boy", by J. J. Millard, the same person who is the author of a book, or book-length article, entitled "America's Greatest Unsolved Murder," about which complaint is made in the instant proceedings. At the time of the publication by defendant of both the July, 1947 and the February, 1953 books or articles by Millard, Ralph Daigh was Editorial Director of the defendant's said magazine, with general responsibility therefor. In the course and as part of the July, 1947 book or article, the following words appear, with respect to the assassination of Abraham Lincoln: "To recount only the known facts about the assassination would fill volumes—and leave most of the important questions forever unanswered. Mr. Otto Eisenschiml of Chicago, the outstanding authority on Abraham Lincoln's death, has devoted a lifetime of intensive research on the subject. His two books—Why Was Lincoln Murdered? and The Shadow of Lincoln's Death—are packed with his own sensational discoveries . . ." The said article then sums up a number of the findings, conclusions and surmises from the said two Eisenschiml books. There are attached hereto, marked Exhibit "A", and made a part hereof by reference, photostatic copies of pages 73 to 77, both inclusive, of the said July 1947 article.

12. Many of the leading authorities on Abraham Lincoln, the Civil War and American history in general, such as Carl Sandburg, Dr. Paul M. Angle, Dr. James G. Randall, and others, are in agreement with the said statement, or admission, of defendant that this affiant is "the oustanding authority on Abraham Lincoln's death" and that his said two books "are packed with his own sensational discoveries." This affiant has heretofore delivered to counsel for defendant an article on the subject by Professor Paul H. Ruck, of Harvard University, himself a distinguished historian and winner of the Pultizer prize for his book, "The Road to Reunion," in which Professor Buck says, among other things:

> "Historians, prior to Mr. Eisenschiml, indicated their puzzlement, if not bewilderment . . . Mr. Eisenschiml had a chemist's curiosity . . . When the known evidence failed to yield the answers, he sought further with indefatigable energy and curiosity, the result of which was to bring forth new evidence, the existence and relevance of which his predecessors never suspected . . . He found enough . . . to dictate a complete rewriting of the conventional story. . . ."

13. This affiant offers to supply books, reviews, letters, statements, and affidavits by leading historians, setting forth similar expert opinions with respect to this affiant and his said two books. He cites as typical of informed opinion the words of Dr. Paul M. Angle, which appear on pages 122-124 of his book, "A Shelf of Lincoln Books" (published in 1946 by Rutgers University Press in association with the Abraham Lincoln Association). There is attached hereto, marked Exhibit "B" and made a part hereof by reference, a copy of the said expert opinion by Dr. Angle. Dr. Angle is Director of the Chicago Historical Society, formerly secretary of the

Illinois State Historical Library, and formerly secretary of the Abraham Lincoln Association and author of several leading works on Lincoln.

14. After March 27, 1953, defendant infringed affiant's copyright by publishing and placing upon the market a book entitled "America's Greatest Unsolved Murder", which was the principal feature of the Febru-
21 ary 1953 issue of "True," a magazine published by defendant, and which was copied largely from affiant's copyrighted book, entitled "Why Was Lincoln Murdered?"

15. After September 23, 1942, defendant infringed affiant's copyright by publishing and placing upon the market a book entitled "America's Greatest Unsolved Murder." which was the principal feature of the February 1953 issue of "True", a magazine published by defendant, and which was copied largely from affiant's copyrighted book, entitled, "In The Shadow of Lincoln's Death."

16. Copies of plaintiff's copyrighted books and a copy of defendant's infringing book and magazine will be produced at such time or times as shall be required by this court. Affiant has heretofore given defendant copies of his said two books.

17. Affiant has notified defendant that defendant has infringed the copyrights of plaintiff, and defendant has continued to infringe the copyrights.

18. Affiant has prepared a compilation hereto attached, marked Exhibit "C", and made a part hereof by reference, which sets forth in the first column, under the words "True Magazine", passages from the infringing book or book-length article published by defendants in the February 1953 issue of its magazine "True", and which sets forth in its second column, under the words "Otto Eisenschiml", passages from the plaintiff's said

two copyrighted books, copied, plagiarized, infringed and pirated by defendant.

19. The following is a summary of the new factual material presented for the first time in plaintiff's two said copyrighted books, all of which was copied, plagiarized, infringed and pirated by defendant:

(a) That there was a mystery about Lincoln's death;
(b) That Parker was a key figure (His background, which I disclosed, had never before been laid bare.);
22 (c) That Mrs. Lincoln was responsible for Parker's appointment, and therefore could be, by a stretch of the imagination, said to have been under suspicion;
(d) That reports of Lincoln's death had been published in various papers prior to the tragedy, giving examples;
(e) The advertisements in the Washington newspapers, from which Millard drew his description, never had been reprinted before, so far as known;
(f) The significance of the note which was handed to Grant at the White House on April 14, 1865;
(g) The curious fact of Grant's evasiveness in his Memoirs;
(h) Proof that Grant's excuse for leaving Washington was unfounded;
(i) Time-table showing that Grant gained practically nothing by taking an early evening train;
(j) The significance of Stanton's refusal to have Eckert act as Lincoln's bodyguard;
(k) Stanton's false oath about Lincoln not being at the War Department on April 14, 1865;
(l) Stanton's and Eckert's false statements that they were busy at the War Department on the fatal night;

(m) The strange behavior of the editor Hanscom, and of the valet Forbes;

(n) The contradictory and evasive statements of Major Rathbone and Miss Harris;

(o) The two divergent statements of McGowan;

(p) The statement of the coachman Burns that he had taken Parker and Forbes for a drink;

(q) The exact time when Booth fired his shots;

(r) The fantastic clues left in Atzerodt's room;

(s) The contradictory stories of the livery man Fletcher, and the perversion of his testimony by the official recorder of the assassination trial;

(t) The willful changes made in the official record of the trial made by Pitman and Judge Advocate Burnett;

(u) The fact that the pursuit of Booth was not undertaken in the right direction, and that the War Department neglected to follow Booth's trail after Fletcher's report;

(v) The fact that the blotter of the 10th Street Police Station in Washington contained the names of witnesses and their statements;

23 (w) Captain Gleason's part in the story—that he knew where Booth had gone, but was refused cavalry, and was detained at headquarters;

(x) Stanton's delay in broadcasting Booth's name until too late to reach the morning editions;

(y) Proof that Stanton knew the identity of the assassin all along;

(z) When the Southern newspapers received the news of the tragedy;

(aa) The strange behavior of Gobright of the Associated Press;

(bb) The significance of the wire disturbance out of Washington during the crucial hours of the night, and Eckert's testimony in regard to it;

(cc) How the pursuit of Booth was organized;

(dd) The premature arrest of Arnold and O'Laughlin;

(ee) The entire O'Beirne story, based on his private papers and his diary, inaccessible to anyone but myself;

(ff) The discovery that O'Beirne, who almost caught Booth, was recalled after telling what he knew to Grant's chief telegrapher;

(gg) That the "tobacco barn" at Garrett's farm had more than one door;

(hh) Lafayette C. Baker's determination to catch Booth, or substitute another body for it;

(ii) Lafayette Baker's interference with the Dry Tortugas authorities to insure isolation and silence of the imprisoned "conspirators."

20. The following is a summary of the deductions, conclusions and speculations presented for the first time in plaintiff's two said copyrighted books, all of which were copied, plagiarized, infringed and pirated by defendant:

(a) That the conventional story of Lincoln's assassination is inaccurate, and that efforts were made to becloud it;

(b) That the conspiracy was much more wide-spread than generally accepted, and that it reached into high Washington quarters;

(c) That the Radicals and Stanton stood to gain much by Lincoln's death, and why;

(d) That Booth was being protected by some high personage, and why his road of escape was known and kept open;

(e) Why those who wanted to pursue Booth and knew where he had gone were prevented from following him, and why the organized pursuit was intentionally misdirected;

24 (f) Why the wires out of Washington went out of commission during the night of April 14, 1865;

(g) Why the news of the assassination was not allowed to reach Richmond and other Southern cities until it could be assumed that Booth had passed beyond them;

(h) Why the correspondent of the Associated Press suppressed a telegram which had preceded the interrupted wire service;

(i) Why the record of the conspiracy trial was deliberately doctored up;

(j) Why the government was interested only in punishing those conspirators who were suspected of having been in Booth's confidence, while all others were ignored;

(k) Why Grant did not tell the truth when he gave his reason for leaving Washington on April 14, 1865;

(l) The significance of Parker staying on the police force until Stanton was removed from office, and why their dismissals occurred almost simultaneously;

(m) The implication in the premature arrest of Arnold and O'Laughlin, indicating that the identity of the conspirators was known, and that those who might have been in Booth's confidence had to be silenced quickly;

(n) The significance of Stanton's refusal to let Eckert act as Lincoln's bodyguard that night;

(o) The interpretation of Booth's exclamation to Lloyd that they had murdered Lincoln and Seward, indicating that no other murders had been contemplated.

21. In the relatively few instances in the said infringing book or book-length article when defendant did not

copy, plagiarize, infringe and pirate from affiant's two said copyrighted books, it made historical errors, as evidenced by the following examples:

(a) Millard states (page 110, column 1, paragraph 3,) that "we don't know where he (Booth) got the wood," meaning the wood with which the door to the Presidential box was braced. "We" know very well where he got it, but affiant deemed it too trivial an item to record. Booth took it from a music stand in the orchestra.

(b) Millard tries to make a mystery of Sergeant Dye's testimony, (page 109, column II, and page 110). This so-called mystery was completely cleared up in the Surratt trial, with which he evidently is not well acquainted. (See Shadow, page 286, top.)

(c) On page 110, column I, Millard states that "at door 7 Booth could peek through the gimlet hole and see the occupants of the box in their places." He could do nothing of the sort. All he could see was the back of Lincoln's chair, and perhaps part of the President's head. Obviously Millard has a poor conception of the location and size of the hole.

(d) On page 110, column II Millard says, "for everyone who identified Booth, there was another equally positive that it could not possibly have been Booth." So far as affiant has been able to find, no one ever denied that it was Booth. Some were certain that it had been Booth, some were uncertain. No one said it could not possibly have been he.

(e) On page 113, column I, paragraph 5, Millard wonders why Paine needed a guide, since he knew the way to Seward's house. Millard overlooks that Paine did not know the way to Surrattsville, (where he was supposed to meet Booth) especially at night. Herold did, hence he was to act as guide.

(f) On the same page paragraph 8, Millard manufac-

tures a new mystery for the reader. "A second rider," he says, "supposed to have been Herold . . ." He repeats it, column II, paragraph 2, by stating "if it was Herold." Of course it was Herold, as appeared from the sequence of events. There was no mystery about it at all.

(g) On Page 118, column II, bottom, Millard again creates a mystery, then solves it. "Booth," he says, "was trying to discover whether [the soldiers surrounding the Garrett shed] were a picked guard, sent *to help him escape.*" Would 25 private soldiers be entrusted with such a top-secret? And how could they have helped him? By escorting him in uniform through the South, or to Mexico, where he reportedly intended to go?

26 (i) On page 106, column I, paragraph 6, Millard mentions Stanton's "little bells". These bells were Seward's boast not Stanton's, as is well known to everyone acquainted with the history of the Civil War era.

(j) The "gin-soaked prostitute" (page 34, last line) was, of course, never under suspicion in connection with the plot, as Millard indicates.

22. Following the publication of the infringing book or book-length article in defendant's magazine "True" in February 1953, a number of persons, including students of Abraham Lincoln, the Civil War and American history, called affiant's attention to the said publication, remarking upon the close similarities between it and this affiant's said two books, and asking him if the said publication was written by him under a pseudonym. Affiant is informed and believes because he was told so by several such persons that similar letters were received by the defendant.

23. At that time this affiant was seeking to find a publisher for a new edition of "Why Was Lincoln Murdered?" and was assured by his agent, prior to said infringing publication, that it was likely that such pub-

lisher would be found. Thereafter he was advised by the agent that the said infringing publication made it unlikely that such publisher would be found and that if found the sale of copies would be impaired. Affiant offers to furnish an affidavit from his said agent, setting forth the relevant facts in that connection.

24. One Charles E. Mason, a former State's Attorney of Lake County, Illinois, a lawyer, and a student of history, wrote to defendant, under date of February 19, 1953, calling its attention to what appeared to him to be infringements of the copyrights of the plaintiff on the said two books. Under date of February 27, 1953, the defendant replied to the said Charles E. Mason as follows:

27

FAWCETT PUBLICATIONS INCORPORATED
67 W. 44th St., New York 18, N. Y.

February 27, 1953

Mr. Charles E. Mason
224 Washington Street
Waukegan, Illinois

Dear Mr. Mason:

Your letter of February 19th addressed to Roger Fawcett has reached my desk.

You are probably right that Doctor Eisenschiml should have been credited in the piece that Mr. Joseph Millard did on Lincoln's death.

Mr. Millard did considerable research in the Eisenschiml library and in private files for his research on this piece. He also met Doctor Eisenschiml in Chicago and found him the most helpful and generous of men.

The original manuscript from which True made selections for publication did credit Doctor Eisenschiml. However, when it was cut by the editors the credit was removed as is quite often the case in magazine work.

It is possible that the entire original manuscript will be published by a book publisher and if that is true, I am sure the credit to the Doctor will be retained.

Cordially yours,
Ralph Daigh
Vice President
Editorial Director

RD:gk

28 25. The February 1953 issue of the defendant's publication "True", containing the infringing book or book-length article, was sold to the public at 25¢ per copy. This affiant is informed and believes and therefore states that 1,898,285 copies of the said February 1953 issue were sold, bringing in a total of $474,571.00 from sales, and that in addition there was an advertising revenue for the said issue of $193,772, making a total income $668,343.00.

26. The infringing book or book-length article took up 25% of the contents of the February 1953 issue of "True" and was the main feature of the said issue.

27. Except for the material and language taken from this affiant's said two books, the said infringing book or book-length article published by defendant could not have been written, in the judgment of this affiant and other experts. The said copied or pirated material and language are the heart and gist of the said book or book-length article.

Otto Eisenschiml, Plaintiff

Elmer Gertz
Attorney for Plaintiff

Subscribed and sworn to before me this
3rd day of December, 1953.
Gertrude E. Wadenpohl,
Notary Public
My Commission Expires April 19, 1955.
(Seal)

29 EXHIBIT "A".

• • •

30 • • • The school-book account of the murder is familiar to everyone. We are solemnly taught that John Wilkes Booth, a mad actor, shot Lincoln to avenge the South; that Booth was trapped after a mighty manhunt and shot resisting arrest; and that his fellow-conspirators were fairly tried and justly executed for their parts in the terrible plot.

• • •

To recount only the known facts about the assassina-
31 tion would fill volumes—and leave most of the important questions forever unanswered. Mr. Otto Eisenschiml of Chicago, the outstanding authority on Abraham Lincoln's death, has devoted a lifetime of intensive research to the subject. His two books—Why Was Lincoln Murdered? and The Shadow of Lincoln's Death—are packed with his own sensational discoveries. Yet he feels that the surface has barely been scratched.

Before going into Baker's questionable and darkly mysterious part in the affair, it is necessary to review briefly the events leading up to the murder and what had taken place prior to Baker's entry into the case.

To begin with, there is considerable evidence that the plot originated, not in the diseased brain of an insane actor who felt the South had been wronged by a tyrant, but in the diabolically cold minds of Washington politicians. If John Wilkes Booth fired the pistol (and there is even some doubt about that) he may have been no more than the hired tool of some of Lincoln's own political associates.

There is no secret about the political situation at the time. The war had just ended with the Great Rebellion smashed. The South lay prostrate, in physical and economic ruins. The Radical Republicans fought openly to keep her that way. They wanted to guarantee that never would Southern agriculture or commerce compete with the North. More important, they wanted to make sure that never again would

there be a group of Southern representatives in Congress strong enough to block the money-grabbing bills introduced by eastern capitalists.

Lincoln was opposed to all this. He wanted the war forgotten and the South restored to economic and social equality. As quickly as possible he wanted Southern congressmen back in Washington. To make it worse, the voters of the nation had just granted him another four years in which to carry out his program of reconstruction.

Lincoln could not be stopped politically. There was only one other way.

• • •

Queerly, no one seems to have instantly recognized John Wilkes Booth as the man who leaped from the President's box to the stage of Ford's Theatre, shouted, "Sic semper tyrannis!" and vanished out the stage door. This happened about 10:15 on the evening of the fourteenth of April.

Stanton, who had long held full control of the telegraph lines, did not release the first announcement of the shooting to the newspapers until ten minutes past two the following morning, three hours after he left Lincoln's bedside. In this dispatch Booth's name was not mentioned. It was not until 3:20 in the morning, too late for the morning editions of the newspapers, that Stanton finally released the official dispatch giving Booth's name.

Even the hammiest village constable would have sense enough to know that a broadcast of a fleeing man's identity would be the surest way to nab him before he went into hiding. Such an unaccountable and inexcusable delay on the part of the Secretary of War is, to say the least, puzzling.

Explain, if anyone can, why when thousands of police, infantrymen, cavalrymen and detectives were poured out to set up an intensive blockade around Washington—a blockade that even held up trains in Baltimore and put boatloads of alert soldiers on every river and stream—one road was left totally unguarded. This was the road Baker himself had followed, down through Port Tobacco, on his first spy

jaunt into the Confederacy. It was the road still used by every smuggler, spy, deserter and dispatch bearer traveling by land between the Union and the Confederacy.

It was, also, the road actually taken by the assassin.

It is also hard to explain why young Lieutenant Dana, brother of Stanton's Assistant Secretary of War, acted as he did. Dana and a small troop of men stumbled onto the Port Tobacco road within four miles of the house where, at that moment, the fugitives were sleeping. Instead of blocking the trail, Dana immediately ordered his small force to scatter along the shore of a nearby river.

Meanwhile Dr. Samuel A. Mudd, suspicious of two men, one with a broken leg, who had come to him for treatment in the night, had sent his cousin, George Mudd, to notify the authorities. Mudd found Lieutenant Dana and told his story. Dana not only disregarded it, but failed even to mention it to other searchers until Tuesday, four days after the murder. It was not until Friday, one week after the assassination, that anybody came around to search Dr. Mudd's house and find a boot there with Booth's name in it.

Similar instances of either criminal carelessness or deliberate disregard of obvious clues could be multiplied by the hundreds. The school-book story that Booth was trapped after an intensive manhunt is as far from the truth as one could possibly get. Booth's capture, when it came, was apparently neither planned nor even desired, but was an accident caused by his unforeseen broken leg.

Another crazy instance had occurred in Washington that fateful night. A stablehand by the name of John Fletcher had rented a horse to David E. Herold, Booth's companion on the flight. When the horse was not returned on time, Fletcher went hunting for it.

• • •

Later, when the news of the assassination came out, Fletcher told his story at police headquarters. Nobody in-

vestigated. Nobody asked the guard on the bridge who had passed, until the next day.

• • •

At that moment Augur was concealing the discovery that Booth had broken his leg. A few blocks down the street a Major Richards was hiding a star witness, Louis Weichmann, who had been intimate with the conspirators at Mrs. Surratt's boarding house. A dozen other groups and individuals were feverishly double-crossing one another to conceal evidence. The rewards for Booth's capture had become his strongest ally.

Just what put Baker on the right track may never be known. His own story is as obviously untrue as it is confusing.

• • •

32 • • • Later, in his book and in Congressional testimony, Lafayette Baker repeated a curious detail of that fateful Wednesday. With Conger, he rushed to carry the news to Stanton, "When I entered the room he was lying upon a sofa. . . . I rushed into the room and said, 'We have got Booth.' Secretary Stanton was distinguished during the whole war for his coolness, but I had never seen such an exhibition of it in my life as at that time. He put his hands over his eyes and lay for a moment without saying a word. Then he got up and put on his coat very coolly. In the meantime I had laid on his table all the effects that had been taken from Booth. He asked where he was *captured.* I said 'Near Port Conway, beyond the Rappahannock in Virginia. Here are the things found on Booth's *body.*'"

The italics above I have added for emphasis. Notice the peculiar sequence of that statement. Baker implied, and Stanton quite obviously believed, Booth had been taken alive. He indicated this belief by asking where he was *captured.*

Men receiving good news react in odd ways. But to cover

the eyes and lie dead still is a much more natural reaction for a man experiencing or expecting a frightful shock. And if Stanton, as many historians believe, was behind the assassination, the thought of Booth's being taken alive would certainly be a shock.

Baker's delay in mentioning Booth's *body* and his peculiar insistence on recounting the incident in just that strange order, has the suspicious sound of a hireling needling his boss. By itself, the incident could be ignored. But as one of a long sequence of puzzling occurrences, it seems significant.

• • •

A year or so later Lafayette Baker remarked to acquaintances, with a sly smile, "I intended to have Booth's body, dead or alive, or a mighty good substitute for it. . . ."

Well, he got a body. But whose?

33 Thanks to Stanton and Baker the mystery is still unsolved.

• • •

Meanwhile the government prepared to put Booth's fellow-conspirators on trial. These were Mrs. Mary Surratt, at whose boarding house the plot was supposed to have crystallized; Payne, who had attacked Secretary Seward; Herold, who fled with Booth; George Atzerodt, whose alleged part in the plot is open to doubt; unhappy Dr. Mudd, whose crime consisted of setting a stranger's broken leg; and three lesser figures. They were confined on a gunboat and from Stanton's office came the weirdest, cruelest, and perhaps most significant order of all.

"To prevent conversation" the prisoners were fitted with hoods—canvas bags covering their heads and tied at the neck, with only a small hole for breathing and eating. Even Mrs. Surratt, whose guilt was not even circumstantially proved, was subjected to the torture of heavy irons during at least part of her imprisonment. As further

guard against "conversation" each prisoner occupied a middle cell, with an empty cell at each side, and was allowed no communication with anyone.

What possible harm could there be in conversation by these doomed prisoners—unless that conversation might reveals some ugly truths about who really murdered Lincoln? The trial was a farce and a travesty of justice. The prisoners were gagged by the hoods, refused the right to speak in their own behalf, convicted by intent and rushed to the gallows with unseemly haste.

Dr. Mudd, of all the central figures, was the only one to escape hanging. His innocence was almost obvious from the first. But what if Booth, in a delirium of pain, had blurted any inconvenient facts while his leg was being set? The sinister forces directing the case could apparently take no chances. Mudd, along with Arnold, Spangler and O'Laughlin, three minor figures, was rushed from Albany penitentiary to the Dry Tortugas, off Florida.

By a special order, sent by Baker, the four hapless prisoners were confined in a special cell, under special guard, and were *forbidden to have intercouse with anyone else on the desolate island.* Dr. Mudd wrote his wife later that they were unable to move five steps without permission from the guard. Once again it seems clear that what the War Department wanted was not justice but silence.

But of the hundreds of sinister and bewildering evidences of dark plot behind the whole affair, the strangest occurred at the trial of the conspirators, and was not revealed for over seventy years. A few years ago, digging into War Department archives, Mr. Eisenschiml, the Lincoln authority, came upon a shocking find.

In the envelope of exhibits from the trial was the most important of all, the photograph shown to witnesses to establish Booth's identity. It is clearly marked Booth's Photograph, Exhibit I.

It was not a picture of John Wilkes Booth at all—but a photo of his brother, Edwin, to whom he bore only the faintest resemblance.

No intelligent comment is possible on such an incredible discovery. Its implications stagger the imagination.

34 EXHIBIT "B"

A SHELF OF LINCOLN BOOKS.
A Critical, Selective Bibliography
of Lincolniana, By Paul M. Angle.

New Brunswick, Rutgers University Press. In association with The Abraham Lincoln Association of Springfield, Illinois, 1946. Pages 122 to 124:

"Otto Eisenschiml.

Why Was Lincoln Murdered? 1937.

David Miller DeWitt studied the open record of the conspiracy trial and came up with a number of conclusions and questions that reflect seriously upon men who held high office in the government of the United States. Otto Eisenschiml went far beyond the open record—to the archives of the War Department, the records of the Capital police to locate all private papers which patient, sustained research could locate—and emerged with conclusions and questions and mysterious circumstances in comparison with which the contentions of DeWitt become few and almost orthodox. About all one is sure of after reading Eisenschiml is that on the 14th of April, 1865, John Wilkes Booth shot Abraham Lincoln; that twelve days later a man who may have been Booth was shot in the Garrett barn; and that in due though improper course seven men and one woman were convicted of complicity in the crime and either hanged or sent to prison.

To illustrate: Eisenschiml shows that Stanton knew the identity of Lincoln's assassin long before midnight on April 14, yet he did not make Booth's name public until 3:00 a.m. on the 15th. And in spite of the fact that Booth was almost certain to strike for Richmond, news of Lincoln's assassination was not published in that city until April 17, even though there was ready communication with Washington at all times.

To illustrate further: Soon after the assassination every road out of the capital was barred—except the road to Port Tobacco. Yet this was the road the assassin was most likely to take! Moreover, within a few hours of Lincoln's murder, the War Department knew that Booth and Herold had crossed the Anacostia Bridge and at least started on this road. Nevertheless, no troops were sent in pursuit, and when an enterprising officer asked for cavalry horses so that he might dispatch a detail over the Port Tobacco Road, his request was refused.

Eisenschiml has singled out many ominous circumstances in addition to those mentioned, and he has not hesitated to imply that they are not all the result of accident or ineptitude. The reader is bound to infer that the Radical Republicans, and Edwin M. Stanton especially, were responsible for Lincoln's death, although Eisenschiml carefully points out that no scrap of positive evidence supports this hypothesis. Every student would do well to keep that warning in mind.

One may or may not accept the author's implied solution of his mystery. His facts, however, remain—startling enough to be worth following for their own sake. They reveal, at the least, almost unbelievable inefficiency in the War Department, and

go far to explain why four years passed before the North was able to subdue a South greatly inferior in both men and resources."

35 EXHIBIT "C"

February, 1953 Issue of TRUE Magazine's America's Greatest Unsolved Murder by Joseph Millard—COMPARISON with original works of OTTO EISENSCHIML

TRUE MAGAZINE	OTTO EISENSCHIML
1.) Millard, page 36 . . . In the little village of St. Joseph, Minnesota, 40 miles from the nearest railroad or telegraph, men met on the street . . . and asked . . .	1.) In the Shadow of L's Death, page 26 . . . that murder . . . was circulated and talked of in the streets . . . of St. Joseph, Minnesota . . . there were no railroad nor any telegraph communication nearer than 40 or 80 miles . . .
2.) Millard, page 37 In midmorning . . . citizens of Manchester, New Hampshire, talked of his assassination as a thing accomplished . . . Booth had, not long before, visited a relative in Manchester.	2.) In the Shadow of L's Death, p. 25 On the morning . . . people in the New Hampshire town of Manchester openly spoke of Lincoln's assassination as an event of the past. . . . . . . Booth had been in Manchester a short time previously and had a relative . . . there.

3.)
Millard, page 37

At 2:30 on the afternoon of the 14th the Whig Press of Middletown, New York, published the news. The Newburgh Journal had the story, too, but held off publication. . . .

3.)
In the Shadow of L's Death, p. 26

On Friday, the 14th, at 2:30 p.m., . . . a writer in the Middletown Whig Press asserted . . . that the President was shot. . . .

. . . . The Newburgh Journal confirmed the facts . . . but was more conservative. . . .

4.)
Millard, page 105

In his memoirs, Grant skillfully slid over the incident with the excuse of much work to be done and an overwhelming anxiety to see his children.

4.)
Why Was L. Murdered? p. 56

In his memoirs, Grant passed over this episode quickly and skillfully . . . if able to finish his work early, his intention was to join his children. . . .

5.)
Millard, page 105

In those same memoirs he forgot himself to the extent of remarking that by the afternoon of the 13th his work was practically finished.

5.)
Why Was L. Murdered? p. 58

. . . as only one . . . unimportant telegram was sent out by him (Grant), it is obvious that his work was . . . practically finished (on the 13th) . . .

Grant himself admitted as much when he wrote . . . "by the 14th, . . . I was pretty well through with this work. . . ."

6.)
Millard, page 105

What of his very natural yearning to rejoin children so long separated from their father . . . ? But Grant had just returned from City Point, not too far from Burlington.

6.)
Why Was L. Murdered? p. 56

Can one really believe that Grant's longing for his children was so irresistible . . . ? . . . Burlington was only a comparatively short distance from City Point.

36 7.)
Millard, page 105

And that 6 o'clock train he took! It was a Camden & Amboy local, requiring two wearisome changes during the night. . . . He could have gone to the theater, taken an early-morning express and reached Burlington . . . at 2:58 in the afternoon.

7.)
Why Was L. Murdered? p. 56

. . . the evening train which the Grants took . . . at six P.M. . . . All that they stood to gain by suffering the discomforts of a night ride . . . and making two transfers at very inconvenient hours. . . . By traveling on the morning train they could have taken in the performance, and still have arrived at Burlington in the early afternoon. (Follows time table of the Camden and Amboy Railroad giving the departure time of the mail at 6:00 P.M., and the arrival of the express at 2:58 P.M.)

The incongruity of Grant leaving on that train never was pointed out before, and the underlying time table never had been mentioned in books. The difficulty of

finding this time table was considerable. Eisenschiml engaged a student to find it for him and it took him several months to do so.

8.)
Millard, page 105

. . . Twice the sensitive Julia Grant had been publicly humiliated by Mrs. Lincoln's outbursts of shrieking jealousy. The prospect of risking another crazy tantrum in a crowded theatre could have offered no pleasure to Grant's wife.

8.)
Why Was L. Murdered?
pps. 57-59

Mrs. Grant was a woman of education and refinement. . . .

. . . it is no wonder that Mrs. Grant did not enjoy the prospect of an evening in the same loge with the Lincolns . . . especially as she had again been rudely insulted. . . . (The first humiliation is described in detail on page 58.)

9.)
Millard, page 106

. . . Stanton . . . went home to a leisurely dinner. Afterward he went over for a chat with the invalid Seward and sat around with other guests for hours. Then the sound of a band reminded him that a procession was coming to serenade him. Stanton hurried home, made them a pretty speech and went up to bed. He was standing in his long drawers, almost ready to

9.)
Why Was L. Murdered? p. 37

. . . He (Stanton) went home and dined as usual. He then went to see Secretary of State Seward. . . . There he found six or eight people and stayed chatting with them till he heard the music of a procession which had notified him that it would call on him. Thereupon he went home, made the serenaders a little speech . . . and went to his

retire, when a servant burst in with the news of Lincoln's assassination.

10.)
Millard, page 106

And afterward Stanton swore under oath . . . that Abraham Lincoln had not been to the War Department that day at all.

11.)
Millard, page 106

How about the busy Major Eckert? He, too, . . . did not return to office that night. There is no record now of how he spent the evening, but the news of the assassination reached him at his home, where he stood in his bathroom, shaving.

37 12.)
Millard, page 106

They left . . . David Bates to handle the War Department telegraph that night and he yawned through one of the dullest evenings. . . . Only three

bedroom. He was nearly undressed when the news of the assault on Seward was conveyed to him. . . .

10.)
Why Was L. Murdered? p. 34

Stanton . . . testified under oath that Lincoln did not visit the War Department at all after April 13 . . .

11.)
Why Was L. Murdered? p. 38

Now as to Eckert. Was he at his post . . . ?

He was not.

. . . . we have no record of his doings that night . . . and . . . at half past ten he was found at home shaving, when one of the telegraphers came . . . to advise him of the catastrophe.

12.)
Why Was L. Murdered?
pps. 35 & 38

P. 38 . . . The cipher department was left in charge of Mr. Bates; . . . Bates confirmed the report of a quiet evening. . . .

messages were recorded that night. . . .

P. 35 Only three telegrams . . . are . . . on record as having arrived . . . during the evening. . . .

13.)
Millard, page 108

Parker was . . . a month short of 35. Born in Frederick County, Virginia, he had been a carpenter around Washington, had served three months with the Union Army in 1861 and had then joined the Metropolitan Police Force. He lived at 750 L Street with a wife and three children . . .

This John Parker was something less than a model patrolman, to judge by the records. On October 14, 1862, he was on trial before the Police Board for using profane, coarse and insolent language to a grocer who tired of running a rest room for lazy police. He was also accused of violent and disrespectful language to the superior officer who investigated.

For these Parker was "punished" by a reprimand and transfer to another precinct.

13.)
Why Was L. Murdered?
pps. 11, 12, 13

Parker was born on May 19, 1930, in Frederick County, Virginia. He later became a carpenter in the city of Washington, and enlisted in the army shortly after the outbreak of the war. When the Metropolitan Police Force was organized . . . he became one of its first patrolmen. At that time he was married, had three children, and lived at 750 L Street.

His record as a police officer is not one that inspires great confidence. . . . About a year after joining the Force, he was charged with . . . the use of violent, coarse and insolent language. It appears that the owner of a grocery store had complained that officers were . . . loafing in front of his establishment . . . the Police Board found that. . . . "The language he used . . . was

The following months. . . . He was charged . . . with insulting a lady who had applied for police help. Again he was found asleep on a streetcar instead of walking his beat and freed on the ingenuous defense that he had gone aboard to investigate the squawking of ducks.

14.)
Millard, page 108

In April, 1863, we find Parker on trial again, this time charged with being drunk and disorderly in a house of ill fame operated by one Annie Wilson, and with having fired his pistol through a window of that establishment. In his defense Parker paraded Annie herself and a crew of her girls as witnesses. They all

exceedingly violent and disrespectful," (to his superior) . . . he was reprimanded and transferred to another precinct.

P. 13 . . . a fortnight later . . . he was accused of being found asleep on a street car when he should have been walking his rounds; but the charges were dismissed upon Mr. Parker's statement that he . . . had heard the squawking of ducks, and . . . had entered the car to ascertain the cause . . .

. . . it was said . . . that he . . . had used insulting language to the lady making the complaint.

14.)
Why Was L. Murdered? p. 12-13

On March 16, 1863, Parker again found himself before the Police Board. . . . This time he was accused of . . . having visited a house of prostitution, kept by a Miss Annie Wilson . . . that he had fired a pistol through the window.

. . . The witnesses, employees of the house in question,

testified warmly to the good character of John Parker, one girl going so far as to cry indignantly that John had been staying at the bawdy house for five weeks and had never once been seen drunk. . . .

38 . . . After this Parker . . . stayed . . . off the Trial Board records. His name appeared only once, when he was examined by a police doctor after being kicked by a man he was trying to arrest.

proved staunch champions for the defendant, one of them going so far as to declare that he had never in his life seen Parker drunk, "and he had been in that house for five weeks."

Some weeks later, Parker received a severe kick from a man he was endeavoring to arrest. His injuries required the visit of a police physician.

15.)
Millard, page 108

. . . On April 3, 1865, eleven days before the assassination, Mrs. Lincoln wrote a note on . . . to Provost Marshal James R. O'Beirne:

"This is to certify that John F. Parker, a member of the Metropolitan Police has been detailed for duty at the Executive Mansion by order of

Mrs. Lincoln

The next day she wrote O'Beirne again, asking him

15.)
Why Was L. Murdered? p. 14

. . . In a letter written by her (Mrs. Lincoln) on April 3, 1865, to James R. O'Beirne, provost marshal . . . , she asked . . .

This is to certify (she stated) that John F. Parker, a member of the Metropolitan Police has been detailed for duty at the Executive Mansion by order of,

Mrs. Lincoln

. . . Mrs. Lincoln . . . settled the matter by . . .

to see that Parker was exempted from the draft.

16.)
Millard, page 109

All the accounts of that time speak of the four persons in the Presidential Box, that night, and later histories generally accept that figure. But here a baffling question arises. Where was Charles Forbes, Lincoln's valet?

Twenty-seven years later, in a sworn statement, Forbes said, "I accompanied him (Lincoln) in the carriage, was with him from the carriage to the box in the theater, and was in the box when the assassin fired his fatal shot."

17.)
Millard, page 109

Why was he (Forbes) never mentioned in a single account, never questioned by

asking . . . , "Please have (him and another patrolman) exempt from the Draft."

16.)
Why Was L. Murdered? pp. 23, 447 & 448

Most authorities have, therefore, concluded that only. . . . four persons occupied Lincoln's box. . . . Yet, there is every reason to believe that. . . . The occupants of the box did not number four, but five; . . .

The fifth occupant of the box was Charles Forbes, Lincoln's . . . personal attendant.

Pps. 447, 448. The following is Charles Forbes' sworn statement (dated September 17, 1892.)

. . . I accompanied him in the carriage, was with him from the carriage to the box in the theatre, and was in the box when the assassin fired his fatal shot.

17.)
Why Was L. Murdered, p. 29

It is difficult to envisage a trained news reporter,

news-hungry reporters . . . ?

18.)
Millard, page 109

But there is evidence Forbes was in the Box— . . .

Almost two months after the assassination S. P. Hanscom, the editor of the National Republican, got around to giving his readers a bit of stale news. He had been, he wrote, the last man in the Presidential Box before the crime. He
39 went to deliver an important dispatch that had been entrusted to him at the White House. There was no guard at the door, he reported, no one on duty except Charles Forbes, to whom he gave the message.

. . .

. . . there is no record of any dispatch at all, and none was ever found. Forbes made no public mention of it at all.

on the scene . . . leaving these questions uninvestigated, unanswered . . . why did he not interview Forbes . . .

18.)
Why Was L. Murdered?
pps. 23, 24, 29

. . . there is no lack of verification from other sources.

. . . the editor of the Washington National Republican, . . . S. P. Hanscom, . . . was, probably, the last person at the box of the President prior to the assassin's entry of it. (He) went there for the purpose of delivering to the President a message, which (he had been) requested to convey from the White House. Upon approaching the door . . . . (he) found no other person . . . than Mr. Charles Forbes.

Page 29 . . . If a document was found on Lincoln's body, the story has never been told. If Forbes failed to deliver, it, he never disclosed the fact.

19.)
Millard, page 109

Hanscom really did visit the Presidential Box. To get to it he had to ask two patrons in the Dress Circle to move their chairs so he could get by . . . permitting a glimpse of the envelope he carried.

These two, a Lieutenant Crawford and a Captain McGowan. . . .

19.)
Why Was L. Murdered?
p. 25

Testimony from several witnesses proves that Hanscom's tale was founded on fact and was not the product of an overwrought imagination. Lieutenant Crawford, (and) . . . Captain Theodore McGowan . . . saw Hanscom . . . (he) exhibit(ed) . . . an envelope. . . .

20.)
Millard, page 109

. . . At the trial McGowan's testimony made no mention of either a name or message.

20.)
Why Was L. Murdered?
p. 27

. . . the witness McGowan . . . made no mention whatsoever of him. (Hanscom).

21.)
Millard, page 109

. . . . the coachman, Burns . . . at some time during that evening Forbes and Parker came out together and took him into the saloon next door for a drink.

21.)
Why Was L. Murdered?
pps. 16, 17

. . . Burns, Lincoln's coachman, stated that " . . . The special police officer and the footman of the President came up to him and asked him to take a drink with them. . . . "

22.)
Millard, p. 110

Later that night Clara Harris gave her sworn statement . . .

. . .

The statement should have aroused feverish interest, but it didn't, for the simple reason that Clara Harris made another statement a couple of days later and *left that part completely out.*

22.)
Why Was L. Murdered?
p. 26

What makes Miss Harris' statement . . . doubly remarkable is that it differs so radically from the sworn statement she made . . . two days later. . . . She must have forgotten the man . . . completely. . . .

23.)
Millard, page 114

But Benn Pitman's original handwritten transcript of the testimony is still in the National Archives Washington, containing the important part of Fletcher's story which was baldly omitted from the published version.

In the testimony that failed to reach print, Fletcher told how, seated in front of his stable, he heard passers-by talking of the assassination "and they were saying that it was men riding on horseback that had shot President Lincoln."

23.)
Why Was L. Murdered?
pps. 110, 112, 113. (The printed testimony and a photostat of Pitman's handwritten official report are reproduced in Eisenschiml's book.)

p. 110 . . . the interesting part of his (Fletcher's) story begins where Pitman's report leaves off. Fletcher (stated) that he overheard people on the sidewalk saying "that it was men riding on horseback that had shot President Lincoln."

40 24.)
Millard, page 114

And it turns out that John Fletcher, . . . was no mean liar himself . . .

His testimony placed him near the Navy Yard bridge at ten minutes to 12 . . .

But on the blotter of the Metropolitan Police Force is a list of people . . .

According to that record, John Fletcher was at police headquarters . . . at some time between 11 o'clock and midnight.

24.)
Why was L. Murdered?
pps. 110, 111.

According to this hostler's testimony at the conspiracy trial, he did not go to the police station until after one-thirty A.M., while the police records mark the time of his appearance at headquarters before midnight . . . other parts of Fletcher's story . . . do not ring quite true either.

25.)
Millard, page 114

. . . Fletcher . . . told his story to a detective named Charley Stone. Stone immediately took him straight to the headquarters of General G. C. Auger, . . .

Now, of course, there would be a swift concentration of pursuit along the road. . . . Troops would be immediately dispatched to question Sergeant Cobb at the bridge. . . .

But nothing at all was done . . .

No troops set out. Nobody questioned the guards at the Navy Yard bridge.

25.)
Why was Lincoln Murdered? p. 114

(Fletcher) . . . went in company with a city detective named Stone to General Augur's headquarters. . .

. . . Now, of course, General Augur would surely move every man at his command to follow the culprits. But not a single soldier was dispatched to the Anacostia bridge. . .

26.)
Millard, page 114

. . . at about that time one Gleason burst into Auger's headquarters, begging for a cavalry troop so that he could grab Booth . . .

Gleason was flatly refused. To make certain that he did nothing on his own . . . he was confined to Auger's headquarters the remainder of the night on the pretense that his services were needed there.

27.)
Millard, page 114

The first and most important job, of course, would be to identify the assassin and broadcast his identity and description . . . In the first few minutes after the shot, seventeen persons had rushed to . . . Police Headquarters to swear to Booth's identity . . . both Richards of the . . . Police and General Anger were in constant touch with Stanton. . .

26.)
Why Was Lincoln Murdered? p. 114

It could not have been much later when Captain Gleason put in an appearance at Augur's office . . . He begged to be given a mounted squad, . . . but he . . . was flatly refused. Gleason was told that his services were of more value in Washington; . . . he was . . . kept idling at headquarters until morning.

27.)
Why Was L. Murdered?
pps. 66, 68

. . . If there was to be a successful hunt for the murderer, it was imperative that both his identity and his description should promptly be made public.

p. 68 . . . The police blotter of Washington for that night shows the arrival of not less than seventeen persons at Richards' headquarters between eleven and twelve o' ck . . . all of whom knew who the murderer was.

28.)
Millard, pps. 114 & 155

. . . Stanton waited almost four hours before releasing the first notice of the assassination to newspapers.

41 He waited another hour after that — until the morning papers would be well into their press runs — before announcing the name of the suspect . . .

. . . The Richmond Whig got no notice at all . . . until the following Monday. It was twelve days before Macon, Georgia, heard the news.

28.)
Why Was L. Murdered?
pps. 65, 66, 84, 85.

P. 65 . . . the first dispatch of the Secretary of War was not written out until . . . more than three hours after Booth's . . . deed; . . .

P. 66 . . . But not until two hours later did Booth's name appear in the telegrams, and by that time it was too late for some of the morning papers to print it.

P. 85 . . . the Richmond Whig did not print the news . . . until Monday morning, April 17.

P. 84 . . . the Macon Daily Evening News, . . . did not receive Stanton's dispatches until April 26 . . .

29.)
Millard, page 115

One L. A. Gobright of the Associated Press was just closing his Washington office when the terrible news came. Rushing out, he quickly wired his papers:

. . .

From there Gobright hurried to Ford's Theater for

29.)
Why Was L. Murdered?
p. 73

. . . L. A. Gobright, agent of the Associated Press at the Capital . . . was about to close his office . . . when he was informed of the tragedy. Rushing to the telegraph office, he sent a short special . . .

more details . . . the man . . . Kent found the derringer on the floor.

30.)
Millard, page 115

Suddenly Gobright flashed a second telegram to his newspapers. Without a word of explanation . . . this one ordered the papers to disregard the news he had sent.

31.)
Millard, page 115

And shortly after the assassination, every commercial telegraph line out of Washington went dead and remained dead for nearly two hours.

. . .

The break . . . was never cleared up. It becomes even more of a mystery with the discovery that no very strenuous efforts were ever made to explain it . . . it would be two years before any mention . . . got into official records . . .

. . . Stanton's too-busy aide, Major Eckert . . . Asked if he knew anything . . . he tore over to Ford's Theatre . . . and was fortunate enough to find Booth's derringer on the floor . . .

30.)
Why Was L. Murdered?
p. 75

. . . Gobright . . . sent a peculiar wire to the papers that subscribed to his services . . .

OUR WASHINGTON AGENT ORDERS THE DISPATCH ABOUT THE PRESIDENT "STOPPED".

31.)
Why Was L. Murdered?
pps. 78, 79

A bizarre incident on the night of April 14 was an interruption of all telegraphic communication between Washington and the outside world,

No official mention of this break . . . was ever made; . . . Finally . . . this matter was brought to the fore, and Major Eckert . . . was put on the witness stand. (He testified) "It was my impression at the time they were cut . . .

Q. Was there an investigation into what was the . . . cause . . .?

about (it) . . . replied. "It was my impression at the time they were cut . . ."

. . . asked, "Was there an investigation into what was the real cause . . .?"

Major Eckert's answer to that was a classic, "No, sir. It did not at the time seem to be sufficiently important."

A. No, sir. It did not at the time seem to be sufficiently important . . .

42 32.)

Millard, page 115

The first order for patrols . . . went to Colonel Thompson at Darnestown, northwest of Washington, apparently on the peculiar theory that a murderer employed by the South would seek refuge in the country occupied by his bitterest enemies.

32.)

Why Was L. Murdered? P. 91

. . . . Colonel Thompson, commanding at Darnestown, was probably the first to be instructed . . .

For unfathomable reasons it was deemed advisable to arouse first the northern and northwestern environs . . . It was a direction the assassins could hardly be expected to take. The roads . . . led into Union territories where neither shelter nor aid would be available . . .

33.)

Millard, page 116

. . . Booth was supposed to have shouted . . . to Lloyd, "I am pretty certain that we have assassinated the

33.)

Why Was L. Murdered p. 171

. . . John M. Lloyd . . . quoted one of them (the assassin) as saying: "I am

President and Secretary Seward."

. . . By not mentioning any other Cabinet Member, he implied that no plot against any others existed.

pretty certain that we have assassinated the President and Secretary Seward." Not one word about Johnson. If the latter's death had been included in the murderers' plans, how could they be so sure . . . that Johnson was unharmed?

34.)
Millard, page 117

John Parker had vanished after the assassination. Where he went or what he did to soothe his guilt-ridden soul that night, nobody knows. But at 6 o'clock Saturday morning he stumbled into Police Headquarters towing a suspect—a prostitute named Lizzie Williams . . .

Lizzie was promptly discharged.

34.)
Why Was L. Murdered?
p. 17

What Parker did immediately after the assassination has not been definitely ascertained. The police blotter of that night shows that at 6 A.M., . . . Parker brought to headquarters a woman by the name of Lizzie Williams. One can visualize . . . the patrolman, made desperate by the tragedy he should have and could have prevented, roaming the streets . . . all night long . . . as an atonement . . . Parker . . . brought in a woman of the streets who . . . was promptly discharged.

34a.)
Millard, page 117

He (Parker) remained on the police force, . . . until

34a.)
Why Was L. Murdered?
p. 19

July 27, 1868 . . . He was

July, 1868, when . . .

He was caught sleeping on his beat . . . even his own superior officer testified that he had been ill. From an unnatural tolerance, the trial board had swung to an . . . unnatural tolerance, almost as if some mysterious protection . . . had been . . . withdrawn.

. . . Secretary Stanton, too, had just been fired.

35.)
Millard, page 117

. . . O'Beirne was writing in his journal, "Sam'l Cox. His mill servant states to another . . . that Cox had been cooking provisions lately & carrying it to persons down in the swamp . . ." That close O'Beirne came to making the capture then . . .

43 36.)
Millard, page 118

Captain Beckwith, Grant's chief telegrapher and cipher operator, had been sent to Port Tobacco . . . to open a telegraph station. O'Beirne made the error of telling Beckwith what he had found

found asleep on his (Parker's) beat . . . although he . . . had been ill, and . . . the sergeant . . . confirmed the statement.

Parker's last offense was perhaps the least important one . . .

. . . Yet the official axe fell promptly.

A few weeks prior . . . Stanton had . . . been ousted.

35.)
Why Was L. Murdered?
p. 120

In a diary (O'Beirne wrote) "Samuel Cox . . . His mill servant states . . . that Cox had been cooking provisions lately and carrying it to persons down in the swamp . . ."

That close O'Beirne came to getting his man.

36.)
Why Was L. Murdered?
pps. 122, 123

When Major O'Beirne fell in with Captain Beckwith . . . he gave Grant's telegraph operator a summary of his achievements and plans . . . This officer . . .

out so far. The cipher operator promptly cut into the Washington line and flashed the whole story to Stanton.

Back came a report and, to O'Beirne, bewildering reward for his zeal — a flat order from Stanton to remain on the Maryland side . . .

cut into the telegraph lines leading to Washington and gave to the War Department the gist of the information he had r e c e i v e d . . . One can imagine his (O'Beirne's) surprise and despair when orders came over the wire from Washington to . . . remain on the Maryland side of the Potomac.

37.)
Millard, p. 119

So the body of a man was borne back to Washington — the body of *some* man. Lafayette Baker, g r i n n i n g harshly, would soon be remarking to a friend, "*I intended to have his* body, dead or alive, or a *mighty good substitute for it.*"

37.)
In The Shadow of L's Death, pps. 73, 74

. . . After a little while Baker's friend said, "'I am glad that they got Booth.'"

. . . (Baker) smiled, and said, "So am I. *I intended to have his body, dead or alive, or a mighi good substitute for it . . .*"

38.)
Millard, p. 117

Arnold a n d O'Laughlin had been arrested so swiftly that the War Department unwittingly betrayed itself. With them . . . the orders for arrest came almost immediately. Afterward Stanton tried to cover up by . . . a letter . . . but the actual

38.)
Why Was Lincoln Murdered? p. 49

On what information could O'Laughlin and Arnold possibly have been suspected, unless their names had been known to the Washington authorities . . .? In arresting these two men so quickly, the War Department erred

arrests came *before* the letter. Only prior knowledge of Booth's plot . . . could have accounted for those swift arrests.

39.)
Millard, p. 120

. . . Edward Bates, the former Attorney General . . . called Speed's opinion, "The most extraordinary document I ever read, under the name of a law opinion . . ."

. . . Orville Browning, later Secretary of the Interior, cried that the Commission was without authority, its proceedings void. "The execution of these persons," he protested, "will be murder."

40.)
Millard, p. 116, par. 4, lines 3-9

The Surrattsville Tavern . . . was no more than a ramshackle farm tavern with a peach orchard . . . and a few sheds and barns lying across . . . the road . . . His (John's) mother had leased the placed to one John Lloyd for $600 a year.

. . . The (slip points), however, to some secret knowledge possessed by the Secretary of War and his department.

39.)
Why Was Lincoln Murdered? pps. 230, 231

"This is the most extraordinary document I ever read, under the name of a law opinion," he (Edward Bates) declared. . . .

. . . Orville Browning, later Secretary of the Interior, was moved to a similar expression . . . "This commission was without authority," he wrote, "and its proceedings void. The execution of these persons will be murder."

40.)
In the Shadow of L's Death, p. 91

It was a solitary farm tavern at a crossroad, a few sheds and barns, . . . and a peach orchard . . . the farm was afterward let . . . for $600 a year.

44 41.)

Millard, P. 105, Column II, lines 14-16 from bottom.
"He (Lincoln) complained that a military escort—made so much noise — that he could (not) h e a r himself think."

41.)

Shadow, P. 5, lines 9-10 from bottom
"The burden of his (Lincoln's) complaint against the escort was that he and Mrs. Lincoln could not hear themselves talk."

42.)

Millard, P. 107, Column I, line 6, from bottom
"Paine had the strength to subdue the . . . still-muscular Lincoln."

42.)

Shadow, P. 9, line 7 from bottom
"Paine w i t h h i s gigantic strength, was to have subdued the powerful Lincoln."

43.)

Millard, P. 114, Column II, Par. 2
"Now, of course, t h e r e would be a swift concentration of pursuit along the road identified by Fletcher . . .
But nothing at all was done . . ."

43.)

WHY? P. 116, line 1.
"The story John Fletcher told should have caused all pursuit to converge on the roads indicated by Fletcher . . . but this was not the immediate result."

44.)

Millard, P. 114, Column II, lines 9-10 from bottom.
"Both Richards—and General Augur were in constant touch with Stanton."

44.)

WHY? P. 68, line 2 to 10
"Richards immediately got in touch with G e n e r a l Augur, who . . . in turn hardly could have failed to acquaint Stanton . . . with the facts.

45.)
Millard, P. 116, Column I, line 4
"The two were riding—along one of the best known unofficial highways—the advertised route of spies and couriers between Washington and Richmond."

45.)
WHY? p. 97, last 4 lines
"The only likely route for Booth . . . was what was then known as the underground railway to Richmond and was travelled by spies and dispatch-bearers—."

46.)
Millard, P. 116, Column I, Par. 6 from bottom, line 1
"Booth was s u p p o s e d to have shouted back to Lloyd, 'I am pretty certain that we have assassinated the President and Secretary Seward.' (Par. 5 from bottom). By not mentioning any other cabinet members, he implied that no plot against any other existed."

46.)
WHY? P. 171, lines 16-21
"Lloyd . . . quoted one of them as saying: 'I am pretty certain that we have assassinated the President and Secretary Seward.' Not one word about Johnson. If the latter's death had been included—how could they be so sure—that Johnson was unharmed?"

45 47.)
Millard, P. 116, Column II, Paragraph 5, line 1
"Herold explained that they were headed toward Washington — They were riding south, Herold admitted, but only to reach the Potomac in the hope of finding a boat headed north."

47.)
WHY? P. 258 Par. 2, last 3 lines
"The fugitives were in a hurry to reach the Potomac, going south, Herold claimed, that they might find a boat to take them back north to the Capital."

48.)
Millard, P. 117, Column II, Line 9
"Major O'Beirne — picked up a clue (line 20) two of these walked on crutches. (line 12) — It was a false trail.

48.)
WHY? P. 123, line 9-11 from bottom
"A new . . . clue had been discovered. A hired girl . . . reported . . . two men, one of them on crutches . . . The two men were never found, however.

49.)
Millard, p. 118, Column 1 Paragraph 2, line 2
"The three soldiers, who openly confessed to harboring, aiding and protecting the assassins were never tried or punished—Jett was even used as a government witness—."

49.)
WHY? P. 303 lines 4-8
"Jett, Bainbridge and Ruggles—never denied their respective parts, but none of them were ever prosecuted, and Jett even appeared as a witness for the government."

50.)
Millard, P. 118, Column II, Paragraphs 4 & 5
"The accepted story, . . . that the one door of the barn was padlocked"—It is significant, then, to discover that double doors were on all four sides—. " 'The authority for that is William Garrett, and his brother added the information that "there were doors that fastened on the inside.' "

50.)
Shadow, P. 70, last paragraph, P. 71, top
"According to this testimony there was only one door—. The Reverend Richard B. Garrett — states that double doors were on all four sides —. William H. Garrett, writing in the Confederate Veteran in April, 1921. confirms — there were doors that fastened on the inside."

51.)
Millard, P. 118, Column II, Paragraph 6.
Two years afterward Lieutenant Baker — said, "Only one door of the barn was opened—.

51.)
Shadow, P. 71, last 6 lines
Lieutenant Luther B. Baker, on June 1867 (said) "Only one door of the barn was opened".

46 52.)
Millard, P. 119, Column 1, line 9 from bottom
"Would a dying man be surprised at hearing his own name spoken?"

52.)
Shadow, P. 55, last line
"What can be the meaning of this? A dying man hears his name mentioned — and acts surprised.

53.)
Millard, P. 119, Column II, Par. 5
"Lafayette Baker, grinning harshly, would soon be remarking to a friend, "I intended to have his body, dead or alive, *or a mighty good substitute for it.*"

53.)
Shadow, P. 71, last line
"(Baker) smiled, and said *"—I intended to have his body, dead or alive, or a mighty good substitute for it."*

This incident is taken from a very rare book, by Velasquez, Story of the Civil War, (1890). The significant thing is that in the original, the last part of Baker's remark is *not* in italics. (See Shadow, page 379, Note 43.) Eisenschiml put them in, and Millard copied them—a dead give-away.

54.)
Millard, P. 119, Column II, Last 4 lines
"—Mary Surratt was—tortured by having the hope of reprieve dangled before her —."

54.)
WHY? P. 179 Par. 2, last lines.
"To Mrs. Surratt, in all likelihood, a promise of clemency was held out."

55.)
Millard, P. 120, Column I, Paragraph 3 from bottom
"On August 17, Lafayette Baker telegraphed from Louisville that he had uncovered a plot to rescue the prisoners—. The prisoners were placed in solitary confinement, denied the right to exchange a single word—watched every minute by special guards.

55.)
WHY? P. 181, Paragraph 2, line 2, P. 182, line 3 from bottom
On August 17 — the chief of the secret service dispatched a message saying that he had discovered a conspiracy to liberate the state prisoners—. A little later, (they) were confined in a small—room. "We were," wrote Arnold, "denied all intercourse with everyone on the—island, and were always accompanied by an armed guard—."

56.)
Millard, P. 120, Col. I, last line
The American Vice-Consul at Liverpool—got a shocking lesson—. Upon a consultation with the Secretary of War and the Judge Advocate General, it is thought advisable that no action be taken etc."

56.)
WHY? P. 200, middle
—the vice consul at Liverpool probably got the shock of his life when he received the reply—. —upon a consultation with the Secretary of War and the Judge Advocate, it is thought advisable that no action be taken, etc."

47 57.)
Millard, P. 120, Col. II, Par. 5
"The government hired Albert G. Riddle to—'hunt up or, if necessary, manufacture evidence against the prisoner (Surratt)."

57.)
WHY? P. 206, lines 5-7
"Riddle had been employed to hunt up, or manufacture, testimony against the prisoner."

58.)
Millard, P. 106, Col. I, Par. 2
Booth's original plot against Lincoln was fantastic but not necessarily unworkable. —From a legal standpoint, it was not a crime.

58.)
Shadow, P. 8 Par. 2, Line 7
To many, the abduction of a President . . . may h a v e s e e m e d preposterous. On closer analysis, though, it would be found e n t i r e l y practical . . .
(P. 16, last line) A successful abduction . . . would not have been contrary to the laws of civilized warfare."

59.)
Millard, P. 105, Col. I, Par. 5 line 3.
Stanton was late. Stanton was always late to cabinet meetings . . . to feel the power of his position.

59.)
WHY? P. 4, line 6
Stanton . . . usually came late. It was his way of indicating the superiority he felt . . .

60.)
Millard, P. 105, Col. I,
Then Stanton made his . . . entrance. Lincoln seemed to freeze . . . He said abruptly, "Gentlemen, let us proceed to business."

60.)
WHY? P. 4, line 3
Stanton entered. The President stopped a b r u p t l y. "Gentlemen," he said, "let us proceed to business."

61.)
Millard, P. 37, Par. 4, lines 7-8
"— Excitement over the visit of the President—was increased by the news that the party would include General and Mrs. U. S. Grant. The Lincolns could be seen any time."

61.)
WHY? P. 59, last paragraph
"Lincoln was not an unusual sight in his own capitol, but Grant was sure to arouse—curiosity."

62.)
Millard, P. 104, Col. I, line 7-9
"Announcements played up the presence of General Grant in bold headlines and mentioned the Lincolns as a small-type after-thought."

62.)
WHY?, bottom ad on P. 60 also P. 59, par. next to bottom
"The advertisement is centered around—Grant, barely mentioning . . . the President.

48 63.)
Millard, P. 105, Col. II, lines 15-19
"Lincoln was stunned, his voice . . . was almost pleading . . . Grant (left) the chief . . . staring after him with an expression of deep hurt . . .

63.)
WHY? P. 61, line 10.
"Lincoln felt the affront keenly . . . as Grant took his leave. But apparently his plea fell on deaf ears."

64.)
Millard, P. 111, Par. 4, line 4
The world knows when Lincoln died, but — no one knows the time when he (Lincoln) was shot. —the

64.)
Shadow, P. 351, line 1 & last lines
"It is known to a second when Lincoln died. —No one, however, has recorded the — time when (he) was

time usually accepted is 10:13—	shot . . . Booth fired his shot at or close to 13 minutes past 10:00 PM.
65.) Millard, P. 113, Col. I, last line (Cobb) thought the man at the bridge had been shorter and of lighter complexion . . . A good defense lawyer could have pounced on this uncertainty to build up Herolds defense, but Frederick Stone, his counseler, said nothing at all about this."	65.) WHY? p. 253, par. 2 and 3. "he was taller (than the second horseman)—He had a lighter complexion." —A clever lawyer might have made something out of this —But Frederick Stone, who conducted the defense, did little more than apologize . . ."
66.) Millard, P. 116, Par. 4, from Bottom (The four detectives) were certain that the strangers had been Booth and Herold, but by keeping quiet, they hoped to make the capture themselves.	66.) WHY? P. 119, last paragraph (Lovett, the leader of the detectives): "I was under the impression that Booth and Herold were in the neighborhood . . . and we would get the whole of them."

49-50 • • •

51

IN THE UNITED STATES DISTRICT COURT
(Filed Jan 28 1954)

State of Florida }
County of Sarasota } ss.

Joseph Millard of 2462 Belvoir Boulevard, Sarasota, Florida, being duly sworn, deposes and says: Although

not a party-defendant in this action, I am making this affidavit in opposition to the plaintiff's motion for summary judgment.

I am the author of a story which was entitled "History's Maddest Murder Case". This title was changed by the editors of the defendant, Fawcett Publications, Inc., to "America's Greatest Unsolved Murder". The story was published in the February 1953 issue of defendant's magazine True. This story is the product of my own ingenuity, research and hard work. The historical facts which are contained in the story are facts of history which have appeared in various works from time to time and which I am informed are not in and of themselves proper subjects of copyright. It is true that there are historical novels and stories concerning the assassination of Abraham Lincoln and the death of John Wilkes Booth. Plaintiff has no monopoly upon historical facts. Plaintiff
52 in his two books has set forth many pages of notes and credit lines and revealed the sources of his material.

I spent five and one-half months, twelve hours a day, in preparing this manuscript. I have invested thousands of dollars in my own library, which includes books, magazines, newspapers, journals and documents dealing with this period of American history. I am the owner of a well-worn admission card to the research rooms of the National Archives in Washington. There is not one statement contained in my article which has not been checked and double checked through every available source. The comparisons which plaintiff has set forth between his work and mine are comparisons of historical data, and no one is given liberty to alter the facts. It is a fact that Abraham Lincoln was shot on April 14, 1865. It cannot be reported in any other way by either the plaintiff, myself or anyone else. I did not copy any of my material from the plaintiff's copyrighted works. There are simi-

larities in historical sequence between his works and mine, but that is so only because we are both interested in the same historical subject matter.

I composed my own original work. It is based upon historical fact and it is not copied from the plaintiff's copyrighted material.

/s/ Joseph Millard

Sworn to before me this
12 day of December, 1953.
(Seal) Edith B. Land
Notary Public, State of Florida at large
My commission expires May 24, 1955.
Bonded by American Surety Co. of N. Y.
Sarasota County
Sarasota, Fla.

53 • • •

54 TRANSCRIPT OF PROCEEDINGS
(Filed June 20, 1956)

had in the above-entitled cause before the Honorable Philip L. Sullivan, one of the Judges of said Court, in his court room in the United States Court House, at Chicago, Illinois, on February 11, 1954.

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55 • • •

56 • • • The Court: Well, now, I presume you gentlemen are familiar with how our court of appeals here anyway feels about summary judgments. I think only about one-half of one per cent ever stand up. If there is any issue of fact at all, they say, "Well, give them their day in court."

Now, I don't know how a summary judgment could be entered here for this reason. He says, that is Millard, and he is the defendant, that he did not copy any of your book. Now, he is entitled to prove that, isn't he?

• • •

57-62 • • •

63 • • • The Court: First of all, there is a motion for a summary judgment. That will be denied, and you can
64 raise your point in the trial, of course.

• • •

65-67 • • •

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At Chicago, Illinois, in said Division and District on February 11, 1954. Present: Honorable Philip L. Sullivan, District Judge:

This day come the parties by their counsel and a pretrial conference is held and upon due consideration the Court being fully advised in the premises it is

Ordered that the motion of the plaintiff for a summary judgment be and the same hereby is denied and on agreement of the parties by their counsel it is

Further Ordered that this cause be and the same hereby is referred to Special Master in Chancery James O'Shaughnessy, Esquire.

69-75 • • •

76

DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSIONS
(Filed Feb 25 1954)

The defendant, Fawcett Publications, Inc., a Delaware corporation, makes the following response under oath to plaintiff's request for admissions heretofore served on defendant's attorneys on February 17, 1954, for the purpose of this action only and subject to all pertinent objections as to admissibility which may be interposed at the trial:

1. Defendant admits the statements in this request.

2. Defendant is without sufficient knowledge to admit or deny the statements contained in request 2.

3 and 4. Defendant admits the statements contained in requests 3 and 4.

5. In answer to plaintiff's request in paragraph 5 to admit the statements made in paragraphs 1 to 27, both inclusive, of plaintiff's Affidavit in Support of his Motion for Summary Judgment heretofore filed herein, defendant makes the following response to each respective paragraph thereof:

Par. 1. Defendant is without sufficient knowledge to admit or deny the statements contained in Paragraph 1.

Par. 2. Defendant denies all of the statements contained in Paragraph 2 except the bare statement that
77 plaintiff wrote said book "Why Was Lincoln Murdered?", which statement defendant admits.

Pars. 3, 4 and 5. Defendant is without sufficient knowledge to admit or deny the statements made in these paragraphs.

Par. 6. Defendant denies all of the statements contained in Paragraph 6 except the bare statement that plaintiff wrote said book "In the Shadow of Lincoln's Death", which statement defendant admits.

Pars. 7, 8, 9 and 10. Defendant is without sufficient knowledge to admit or deny the statements in these paragraphs.

Par. 11. Defendant denies all of the statements in Paragraph 11 except the following which it admits:

(a) That in July 1947 it published in its magazine, "True", the articles entitled: "The Devil's Errand Boy" by J. J. Millard;

(b) That a true and correct copy of said article, pages 73 to 77, both inclusive, is attached to plaintiff's said affidavit as Exhibit "A."

(c) That Joseph Millard is the same person who is the author of the article, "America's Greatest Unsolved Murder;"

(d) That at the times mentioned in this paragraph Ralph Daigh was Editorial Director of defendant's said magazine;

(e) That the words quoted in Paragraph 11 of plaintiff's said affidavit do appear in said article, "The Devil's Errand Boy," but defendant denies each and every other alleged fact, statement, inference, conclusion, implication, or conjecture contained in
78 said paragraph 11 of plaintiff's said affidavit.

Par. 12. Defendant is without sufficient information to admit or deny the statements contained in Paragraph 12 of plaintiff's said affidavit except for the statement that plaintiff delivered to defendant's counsel said article by said Professor Paul H. Buck, which statement defendant admits.

Par. 13. Defendant is without sufficient knowledge to admit or deny the statements in this paragraph.

Pars. 14 and 15. Defendant denies all of the statements contained in Paragraphs 14 and 15 of plaintiff's said affidavit except the bare statement that defendant published in the February 1953 issue of "True" magazine the article entitled "America's Greatest Unsolved Murder," which defendant admits.

Par. 16. Defendant admits that plaintiff presented defendant with copies of plaintiff's said two books but states that plaintiff did so only in order to bolster up his unjust and baseless claim of infringement.

Par. 17. Defendant denies that it ever did or that it has continued to infringe any copyright of plaintiff, but admits that plaintiff has made claims of such infringement, which claims defendant avers are utterly without basis.

Pars. 18 to 21 (j), both inclusive. Defendant is advised that it is not required to respond to these requests in the form in which they appear in Paragraphs 18 to 21 (j), both inclusive, of plaintiff's said affidavit and, there-

fore, makes written objection to the same on the ground that they are utterly improper in form and substance and prays the Court's ruling on said objection.

Par. 22. Defendant is without sufficient information to admit or deny whether plaintiff received any of the communications or had any of the conversations described in Paragraph 22 of his said affidavit. As to the balance
79 of the statements contained in said Paragraph 22, defendant is advised that it is not required to respond thereto for the reason that it is wholly improper in that it calls for conclusions, not facts, and defendant accordingly makes written objection to the same and prays the Court's ruling therein.

Par. 23. Defendant is without sufficient knowledge to admit or deny the facts contained in this paragraph.

Par. 24. Defendant admits that on February 27, 1953, it sent to Charles E. Mason the letter described in Paragraph 24 of plaintiff's said affidavit; defendant is advised that it is not required to answer the remaining statements in said paragraph in that they call not for facts, but for conclusions and comparisons, and defendant accordingly makes written objection thereto, on which objection he prays the Court's ruling.

Par. 25. Defendant admits that the February 1953 issue of defendant's publication "True" was sold to the public at 25¢ per copy. Defendant admits that for the February 1953 issue of "True" there was a gross circulation of 1,898,285 copies, subject to returns and to a further breakdown of subscription and newsstand sales. Defendant admits that the gross advertising revenue was $184,571.00, and the net was $156,885.85, otherwise denies the statements in this paragraph.

Par. 26. Defendant denies that the article "America's Greatest Unsolved Murder" by J. J. Millard took up 25% of the contents of the February 1953 issue of "True".

Defendant admits that it was one of the features of said issue, otherwise denies the statements in this paragraph.

Par. 27. Defendant denies this request.

80-82 • • •

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ANSWERS TO INTERROGATORIES
(Filed Mar 1—1954)

The defendant, Fawcett Publications, Inc., a Delaware corporation, makes the following answers under oath to the Interrogatories hereto served upon it by the plaintiff on February 18, 1954, pursuant to Rule 33 of the Rules of Civil Procedure:

1. As to each of the sixty-six (66) items included in column 1 of Exhibit "C" attached to plaintiff's Affidavit in Support of his Motion for Summary Judgment, heretofore filed herein, defendant states:

(a) That the source of each of said sixty-six (66) items, as far as defendant was concerned, was Joseph Millard, the independent author from whom defendant purchased the article in question as a piece of merchandise for the sum of $1,850.00 on or about January 30, 1952.

(b) Defendant first saw said article containing said information on or about the month of December 1951; defendant does not know when the author, Joseph Millard, first saw said items or their sources.

2. As to each of the thirty-five (35) items included in Paragraph 19 of plaintiff's said Affidavit in Support
84 of his Motion for Summary Judgment, defendant states: It objects to said interrogatories as being utterly incompetent, irrelevant and immaterial for the reason that said thirty-five (35) items contained in said Paragraph 19 are completely unwarranted conclusions which it would be preposterous to require defendant to answer. Defendant further states that the matters as set

forth in Paragraph 19 of the said affidavit are matters of historical fact and as such are part of the public domain over which no one could assert any ownership.

3. As to each of the fifteen (15) items included under Paragraph 20 of plaintiff's affidavit in support of motion for summary judgment, defendant states: That it objects to said interrogatories as being utterly incompetent, irrelevant and immaterial for the reason that, as stated by plaintiff himself in his said affidavit, the said fifteen (15) items consist in plaintiff's own language of "deductions, conclusions and speculations," which are not the subject of ownership by copyright or otherwise.

4. In response to Interrogatory 4, defendant is advised it is not required to answer this interrogatory because the same is incompetent, irrelevant and immaterial.

5. In answer to Interrogatory 5, defendant states that it merely purchased said story from the independent author, Joseph Millard, and does not know what "sensational discoveries" said Joseph Millard had reference to in the question from the said article.

6. In answer to Interrogatory 6, defendant states the following:

(a) The gross circulation of the February 1953 issue of the magazine "True" was approximately 1,898,285 copies, subject to returns and to a further breakdown of subscription and newsstand sales.

85 (c) The gross receipts from advertising revenue was $184,571.00, and the net was $156,885.85.

86-87 • • •

88

DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSIONS

(Filed Mar 8—1954)

The defendant Fawcett Publications, Inc., a Delaware corporation, makes the following response under oath to plaintiff's request for admissions heretofore served on defendant's attorneys on Friday, February 26, 1954, for the purpose of this answer only and subject to all pertinent objections to admissibility that may be interposed at the trial:

1 (a) and (b). Defendant is advised that it is not required to respond to these requests in the form in which they appear in Paragraph 19 of the plaintiff's Affidavit in Support of his Motion for Summary Judgment, and therefore, makes written objection to the same in that they are utterly improper in form and substance and prays the court's ruling on said objection.

2 (a) and (b). Defendant is advised that it is not required to respond to these requests in the form in which they appear in Paragraph 20 of the plaintiff's Affidavit in Support of his Motion for Summary Judgment, and therefore, makes written objection to the same in that they are utterly improper in form and substance and prays the court's ruling on said objection.

3. Defendant is without sufficient knowledge to admit or deny the statements contained in request 3.

4. Defendant is without sufficient knowledge to admit or deny the statement contained in request 4.

89-98 • • •

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DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR ADDITIONAL ADMISSIONS

(Filed Oct 5—1954)

The defendant Fawcett Publications, Inc., a Delaware corporation, makes the following response under oath to plaintiff's request for additional admissions heretofore served on defendant's attorneys on September 7, 1954, for the purpose of this answer only and subject to all pertinent objections to admissibility that may be interposed at the trial:

1 (a), (b), (c), (d), and (e). Defendant is without sufficient knowledge to admit or deny the statements contained in request 1 (a), (b), (c), (d), and (e).

2 (a) and (b). Defendant is advised that it is not required to respond to this request in the form in which it appears and therefore makes written objection in that it is utterly improper in form and substance and prays the court's ruling on said objection.

3 (a), (b), (c) and (d). The defendant admits the statements contained in request 3 (a), (b), (c) and (d).

100 4 (a), (b), (c), (d), (e), (f) and (g). Defendant is advised that it is not required to respond to this request in the form in which it appears and therefore makes written objection in that it is utterly improper in form and substance and prays the court's ruling on said objection. Defendant admits that the February, 1953, issue of "True" magazine went on sale on January 21, 1953. The off-sale date for the February, 1953, issue of "True" was February 20, 1953.

5 (a), (b) and (c). Defendant is advised that this request for admissions is not proper in form and therefore makes written opposition thereto and prays the court's ruling on said objection.

6 (a), (b), (c) and (d). Defendant admits the statements contained in request 6 (a), (b), (c) and (d).

7 (a) and (b). Defendant is advised that it is not required to respond to these requests in the form in which they appear and therefore makes written objection in that it is utterly improper in form and substance and prays the court's ruling on said objection.

8 (a), (b) and (c). Defendant is advised that it is not required to respond to these requests in the form in which they appear and therefore makes written opposition thereto that it is utterly improper in form and substance and prays the court's ruling on said objection.

8 (d). Defendant denies the statement contained in request 8 (d).

101 9. Defendant is without sufficient knowledge to admit or deny the statement contained in request 9.

DEPOSITION OF JOSEPH JOHN MILLARD.

(First marginal number is from the pagination as it appears in the record. The second—parenthetical number is as originally in the deposition when it was filed in court.)

JOSEPH JOHN MILLARD, witness for defendant, testified as follows:

Direct Examination of Mr. Millard by Mr. Martineau.

108 (p. 3) I live at 2462 Belvoir Boulevard, Sarasota, Florida, and am an author. I wrote the article "America's Greatest Unsolved Murder" in the February 1953
109 (p. 4) issue of True magazine in the summer of 1951,
110 (p. 5) I believe, and submitted it in the fall.

(The contract, dated January 30, 1952, was marked as Defendant's Exhibit #3, 3/25/54)

111 (p. 6) (Photostat of a stipulation, in lieu of original, was marked Defendant's Exhibit # 3A, 3/25/54)

111 (p. 6) The original title was "History's Maddest
112 (p. 7) Murder Case", which was changed by defendant, and apparently one half of the manuscript was cut out.

113 (p. 8) I spent from 4 to 4½ months on my research and the final writing of the manuscript, but I had done considerable time on it before, I cannot tell exactly how much.

114 (p. 9) Some time around March 1, 1951, I was commissioned by defendant to write the manuscript.

The nature of my research was to assemble all the books and papers and magazines on the subject of the assassination. The actual writing involved one of these months.

115 (p. 10) I met Dr. Eisenschiml, I think, in the fall of
116 (p. 11) 1946, because a neighbor of his said "I couldn't think of writing about it [that subject] if I did not
117 (p. 12) know him". The meeting took place in his library, and I spent say 1½ hours there.

118 (p. 13) My final research was conducted mostly in New York, but I leaned on research undertaken in connection with a previous story, "The Devil's Errand Boy", done several years before.

119 (p. 14) Most of the books I consulted in preparing the True article are here. (They covered about 28 feet of space.)

120-134 (p. 15-25) (Reading the titles of books and magazines on display.)

134 (p. 25) In addition, there were many more, which I did not own.

135 (p. 26) In the fall of 1951 I moved to Florida, and
134 (p. 25) put my books into storage in New Jersey.
135 (p. 26) I had boxes of notes which I burned. Some
136 (p. 27) of them were handwritten, some typed.

137 (p. 28) I have never been an employee of the defendant.

[The parallels, set forth as Exhibit C of Plaintiff's affidavit for summary judgment — later received in evidence as Plaintiff's Exhibit 7 — were from now on referred to as "Quotes"]

138 (p. 29) I got Quote #1 from Father Chiniqui's "Fifty Years in the Church of Rome". This matter of premature news of the assassination was merely
139 (p. 30) mentioned in "The Assassination and History of the Conspiracy" published in 1865, p. 54. It does not mention St. Joseph specifically.

Quote #2 can be found in the archives of the
140 (p. 31) War Department and in the Congressional Club, the ancestor of the Congressional Record. This also refers to Quote #3. Both facts also are stated in Dr. Eisenschiml's book.

141 (p. 32) Before I wrote my article I had read Dr. Eisenschiml's work. He is admittedly one of the greatest authorities on Lincoln's assassination.

Quotes #4 and #5 have as their source "Grant's Memoirs".

(Witness is reading from cards.) These cards were drawn up largely within the last weeks. I listed
142 (p. 33) on them my authorities for the challenged statements.

143 (p. 34) I did not copy Quote #5 from Dr. Eisenschiml.

Quotes #6 and #7 may be considered together.

144 (p. 35) The train trip is from Porter's "Campaigning with Grant", in Century magazine, October, 1897. He says it was a tiresome trip requiring two changes. I also have here Hassan's railroad guide, which gives the time tables for seven years later, so I did use the schedule from the plaintiff.

146 (p. 37) Quote #8 I would say is touched on by every
147-148 (p. 38-39) writer, specifically Badeau in "Grant in Peace". There are other authorities too.

149 (p. 40) On Quote #9 the closest source is Storey's article in the Atlantic Monthly, April 1920. Oldroyd (p. 41) in 1901 in his book of 1901 puts it much
151 (p. 42) shorter. I am afraid I lifted it from Mr. Storey.

Quote #10 I took from Flower's book on Stanton, published in 1905.

152 (p. 43) Quote #11 I took in part from David Bates "Lincoln in the Telegraph Office", and also from
153 (p. 44) "The Great American Myth" by George Bryan.

Quote #12 I took from "Lincoln in the Telegraph Office."

154 (p. 45) Quote #13 is to be considered with #14 and
155 (p. 46) #15. My sources included Dr. Eisenschiml. Sandburg gives virtually the full story of Parker's life, also "The Great American Myth". Crook
156 (p. 47) and Kerkley mention Parker, but these 3 Quotes were available in the three sources I gave.
157 (p. 48) (Witness reads into the record a section of
158 (p. 49) Sandburg's book "The War Years" dealing
159 (p. 50) with the Parker episode.) That is one source.
160 (p. 51) I have never except in Sandburg and Eisenschiml, seen the exact Quote #15, but Sandburg deleted part of it, and it was from Dr. Eisenschiml that I supplied the missing words.

As to Quote #16, I did not get the language
161 (p. 52) from Dr. Eisenschiml. I did not have Forbes' own statement at the time I wrote the article. In the Journal of the Illinois Historical Society is an eye witness account, mentioning two messengers which accompanied the Lincoln party into the box. The guards were frequently called messengers, she [the author] does not identify them.

162 (p. 53) "The Great American Myth" and Gobright's report also mention Forbes.

Another source, Abbot A. Abbot, says "There were no other persons in the box and no one entered or left it until about the time of the assassination". I don't know what he means.

163 (p. 54) W. J. Ferguson in "I Saw Booth Shoot Lincoln", published in 1930, mentions Parker and Forbes, or appears to speak of Forbes, but I do not believe it is conclusive.

As to Quote #17, I wrote four words on my card, "common sense asks that". I cannot remember looking for sources.

164 (p. 55) I did not steal Quote #18 from Eisenschiml, but got it from the National Republican of June 8,
165 (p. 56) 1865. I read it in the library of Congress, for which I have a special card. [Marked Defense Exhibit #4.]

167 (p. 58) My source for Quote #19 is "The Great American Myth", and the documentation comes from
168 (p. 59) the New York Tribune of April 17, 1865. I did not lift it from Dr. Eisenschiml.

As to Quote #20, I studied three versions of the Conspiracy Trial, Pitman, Ben Poor and the Philadelphia Inquirer. I used Poor's and Pitman's; in fact, I did
169 (p. 60) not know the existence of the Philadelphia Inquirer. I have found it since.

I did not lift Quote #21 from Dr. Eisenschiml. I
171 (p. 62) have a statement here from Sandburg, Vol. 4, p. 279 (reads it). This also is found in the "Great American Myth", p. 175. There are other sources, which I do not recall. • • •

172 (p. 63) Q. Did you steal or pirate (Quote #22) from Dr. Eisenschiml? A. I am rather afraid I did. . . . I had no source other than Dr. Eisenschiml for his original statement. • • •

174 (p. 65) I did not steal Quote #23 from Dr. Eisenschiml. It came from a comparison of Pitman and Poor. One thing I did not get from the archives is
175 (p. 66) Pitman's original transcript; I took Eisenschiml's. I have Pitman here, but I did not look at it; also in the "Great American Myth", on p. 14, it deals with the testimony, or at least brings out Fletcher's additional testimony. I did not look up Poor again. I do not know whether it is in the Philadelphia Inquirer.
177 (p. 68) Now there is a piece of Dr. Eisenschiml's which I took from him. According to him, the police record showed that Fletcher had been there some time between 11 o'clock and midnight, and that I had no other source for.

Quotes 24 and 25 may well be considered in conjunction with Quote 23.

179 (p. 70) On Quote 25 I have just quoted my sources. More is from Baker, pages 529 and 530.
180 (p. 71) I did not lift Quote 26 from Dr. Eisenschiml, I found it in Gleason's article, "The Conspiracy Against Lincoln" in the Magazine of History, Feb. 1911. (Read partly into record.)
181 (p. 72) On Quote 27 one thing is from Dr. Eisenschiml: the number of persons rushing to headquarters. In other sources the number is not given. I took that from Dr. Eisenschiml.
183 (p. 74) My sources for Quote 28 are Townsend, "Life, Crime and Capture of John Wilkes Booth", 1865; also Coggeshell, 1920, "The Assassination of Lincoln".
184 (p. 75) Anyone investigating the murder mystery would wonder why a man should be complimented for waiting three hours.

"The Rebel War Clerk's Diary" mentions that
185 (p. 76) rumors of the assassination had reached Richmond on April 16.

186 (p. 77) On Quote 29 my source is Gobright's "Recol-
187 (p. 78) lections of Men and Things in Washington." (Read into record.) The other source is the New York Tribune, April 15, 1865.

188 (p. 79) Quote 30 should be taken together with Quote 29. The same historical sources apply.

189 (p. 80) An additional statement by Gobright says
190-191 (p. 81-82) that a man named Kent picked up Booth's pistol from the floor of the box.

192 (p. 83) My chief historical sources for Quote 31 are Baker and "The Great American Myth."

194 (p. 85) For Quote 32 my sources were Lloyd Lewis in "Myths after Lincoln", who says that the attention [of Booth's pursuers] was thrown to the North, and Stanton who warned to watch the Canadian border. Also the Official Records, in which a telegram appears to Colonel Thompson, that the assassins are supposed to have escaped toward Maryland.

195 (p. 86) Quote 33 (What Booth is said to have shouted to Lloyd) is covered by both Pitman and Poor. By not mentioning any other Cabinet members, I said he implied that no plot against any others existed. It was an inference encouraged by Dr. Eisenschiml's interest in it, I am afraid.

Clara Laughlin and Townsend mention Lloyd's
196 (p. 87) statement; but it is probably reasonable to suppose that that inference was stimulated by some of Eisenschiml's findings.

198 (p. 89) Quotes 34 and 34A are found in "The Great American Myth" and in Sandburg. Now there again perhaps an inference can be drawn from Dr. Eisenschiml.

199 (p. 90) My sources for Quote 35, for the quotation itself is Dr. Eisenschiml. The facts are stated in a
200 (p. 91) number of places, for instance in Oldroyd,

Thompson, Coggesshell and Laughlin. The exact wording I have not seen anywhere else, I don't believe, but in Dr. Eisenschiml's book.

201 (p. 29) Quote 36 I first got from Baker, then in
202 (p. 93) Bates' "Book of the Telegraph", also in the Official Record. Further in Oldroyd.
203 (p. 94) Quote 37 comes from a book by Madame Ve-
204 (p. 95) lasquez, "The Story of the Civil War."

Now, for that I have to thank Dr. Eisenschiml, who put me on the track of that book.

206 (p. 97) I put my italics in, not because anyone else did, but because I wanted to emphasize the important part. I am quite sure there were no italics in the original book.

207 (p. 98) On Quote 38 one of my sources is Clara Laughlin; another is Margaret Leech.

208 (p. 99) My source for Quote 39 are the two diaries
209 (p. 100) —both original quotes. On Quote 40 part of the description is from Baker, some from Sandburg, some from the Lincoln Herald.

210 (p. 101) My source on Quote 41 is a book "Baked Meats for the Funeral", by a man named Haley or Hanley, who wrote as Private Miles O'Reilly.

212 (p. 102) For Quote 42 my source is Sandburg.

213 (p. 103) For Quote 43 my authority is Baker.

For Quote 44 my first authority is common sense. The head of the Metropolitan Police Depart-
214 (p. 104) ment and the head of the military would naturally be in constant touch with Stanton. Sandburg, I believe, implies as much without saying it directly, and I think Oldroyd.

215 (p. 105) For Quote 45 I have a million of authori-
217 (p. 107) ties — Baker, Dewitt, Coggeshell, The New York Evening Post.

218 (p. 108) Quote 46 is a duplicate of 33, and so stipulated.

219 (p. 109) Quote 47 I wish I knew my authority, but it was not Dr. Eisenschiml. I have a blank card here. I did see it in Dr. Eisenschiml's work.

I am equally vague on Quote 48, but I admit
220 (p. 110) reading what Dr. Eisenschiml says on Quote 48.

221 (p. 111) Dr. Eisenschiml cites the O'Beirne papers, which he alone has, and the War Department archives. I did not see it in the archives.

222 (p. 112) Quote 49 was just a fact. Baker tells about the three soldiers. Jett's testimony is in Pitman and Poor. An article by Dougherty was in the Century Magazine of Jan. 1890.

223 (p. 113) The rest is merely facing the fact that three men who probably did more than anyone to help Booth escape, were not brought to trial, and one was brought in by the government. The inference is mine and Dr. Eisenschiml's. It seems so obvious.

224 (p. 114) Quote 50 and 51 logically belong together.

226 (p. 116) Baker merely says something about "the door which faced the wing of the house", which implies that there must have been more than one door.

Either I am getting tired or I've missed the boat
227 (p. 117) here. He says, —"the front barn door facing the west gable —" which is again not conclusive. The only conclusive thing is Garrett's later story, which was back up, that there were doors on all sides.

Q. In all those authorities which you have be-
228 (p. 118) fore you now, it is not stated how many doors there were in this barn, is that right?

A. That is right.

229 (p. 118) Q. In other words, the only question seems to be where you obtained the information that the barn had four doors — is that right?

A. Yes.

230 (p. 119) Regarding Quote 52, I again fall back on common sense. It's possible, even probable, that I was stimulated to think that, because Eisenschiml thought the same thing.

231 (p. 120-121) Quote 53 is a repetition of Quote 37.

232 (p. 121) Quote 54. My authority is Baker and the
233 (p. 122) daily papers. I am relying on a very ancient
234 (p. 123) and very creaky memory, so I wouldn't want to be pinned down.

Re Quote 55 my authority is Samuel Arnold in "The Lincoln Plot" and Baker.

235 (p. 124) My authority for Quote 56 is Oldroyd,
236-237 (p. 125-126) also Harris, also Smoot.

237 (p. 126) On Quote 57 my authority is Welles' Diary.

238 (p. 127) On Quote 58 I refer to Dewitt first.

239 (p. 128) Quote 59 comes from Welles' Diary, and
240 (p. 129) Coggeshell, also Lloyd Lewis. (Quotes verbatim.)

240 (p. 129) On Quote 60 I am stuck for the moment.

241 (p. 130) Nicolay and Hay or Crook, I am not too positive.

Quote 61 has a great many authorities, for in-
242 (p. 131) stance Oldroyd and Harris.

Quote 62. It is no doubt true that these advertisements in the Washington papers had never been
243 (p. 132) reproduced before, but I spent so much time with these newspapers that I got it from the original papers. I merely saw the ads, so I got it, I think, rather from these quotations from Oldroyd and Harris, and "Reveille in Washington":

244 (p. 133) "The news that Grant would accompany the President threw the Tenth Street Theatre into a furor, but Harry and his brothers bestirred themselves

to prepare for a gala evening, well aware that the presence of the Commander-in-Chief would eclipse the patriotic doings in Grover's". This was one of my background pieces.

My authority for Quote 63, I believe, is Crook—I
245 (p. 134) can't tell you the page.
246 (p. 135) Quote 64. Everybody brought out the fact that the time is not known. In the book "The Assassination and the History of the Conspiracy" is a statement which furnishes the hour at which the President was assassinated, which has been stated all the way from half-past nine to half-past ten.
247 (p. 136) I take it that the objection here is to my statement of 10:13 and Dr. Eisenschiml's at an hour close to that.
249 (p. 138) My selection of ten-thirteen came because in the course of the reading I encountered that over and over. Now, I can't lay my hands on any definite spot; but I gathered the impression that 10:13 was the accepted time.
251 (p. 139A) I have yet to find authority for it, but I am very positive that I didn't say 10:13 because Dr. Eisenschiml said it.

My authority for Quote 65 is Pitman and Poor. That is fairly close to what Dr. Eisenschiml said.
252 (p. 140) I don't think that anyone would have to be guided by another book to jump to the same conclusion.
253 (p. 141) My best authority for Quote 66 is the Journal of the Illinois Historical Society.
255 (p. 143) I have been a student of problems involving the Civil War for thirteen years. The books
256 (p. 144) here are probably 10% of my Civil War books. I have written "The Devil's Errand Boy" and
257 (p. 145) "The Spy who saved the Union." The research on those is interlocking. • • •

258 (p. 146) Q. Did you copy any of your material from Dr. Eisenschiml's two books in question?

A. Well, I did, the ones I brought out here. I
259 (p. 147) copied O'Beirne quote, and I made use of, without directly copying, Dr. Eisenschiml's timetable. I believe there are two or three others, as the testimony has shown. • • •

262 (p. 150) I have been a full time professional writer for about sixteen years.

263 (p. 151) I read Eisenschiml's books six years prior to my writing of "America's Greatest Unsolved Murder". As I wrote this I consulted his books, but not
264 (p. 152) with great frequency, I guess. I regarded Dr. Eisenschiml as the greatest authority on the Lincoln assassination. He is the authority. I never consciously copied him.

265 (p. 153) I first read everything available on the subject, perhaps twelve or fifteen books a day, and finally out of my mind or subconscious will shape the form in which I want to write my story. As I work it is necessary to check dates, spellings and items like that. But I know from this absorption pretty well what I am going to write. Here are two notes in connection with the True story, which I found.

266 (p. 154) (Marked Defendant's Exhibit 5 and 6.)

267-268 (p. 155-156) (Mr. Martineau reads from "The Devil's Errand Boy". . . . "Mr. Otto Eisenschiml . . ., the outstanding authority on Abraham Lincoln's death, has devoted a lifetime of intensive research on the subject. His two books . . . are packed with his own sensational discoveries . . .")

268-269 (p. 156-157) In my manuscript of "America's Greatest Unsolved Murder" I mentioned Dr. Eisenschiml as follows: "Dr. Eisenschiml, probably the

world's leading authority on the mysteries of the
270 (p. 158) Lincoln assassination, has in one curt sentence treated Stanton's story to the respect it deserves. He writes, 'It would be exceedingly interesting to have the name of the bell-ringer who was so busy with other orders that he had the audacity to incur the ire of the all-powerful Secretary of War by postponing the repairs on what was then perhaps the most important door bell in Washington.'" This was crossed out by True. The manuscript was cut from about 40,000
271 (p. 159) words to about 25,000. I did not know his [Eisenschiml's] name had been cut out until I saw the printed copy.

I intended to present the True article as a
272 (p. 160) popularized piece of honest history. I was trying to stimulate interest in this subject. I am not a member of the Civil War Round Table. I was invited once to make a talk there, but I never did.
273 (p. 161) This was following the publication of "The Spy Who Saved the Union".

274 (p. 162) *Cross Examination of Mr. Millard*
By Mr. Gertz.

The books in this office are most of the pertinent ones I had with respect to the subject matter of the article. These were the only ones I remember having used, either in hunting for something I couldn't find or in actually finding something that was new. "Prince of Players," by Ruggles, was included in the pile by mistake. It is not pertinent.
275 (p. 163) In Sandburg "The War Years": I cannot
276 (p. 164) point out in Volume II what I used in connection with my article. I cannot, without some time, point out one relevant page, one portion of the book, and might not even be able to do it then. • • •
277-278 (p. 165-166) Q. I show you another book from the said group called "Report On the Organization and

Campaigns of the Army of the Potomac," by George B. McClellan, and ask you to examine it (handing to the witness).

Will you point out anything in that book having any relevance or pertinence to the February, 1953 article?

A. Not directly, no.

Q. Or indirect?

A. Indirect, yes, if I point to the life of McClellan himself. The fact that McClellan was part of the faction involved in a controversy, he was associated with the radical element later, or supposed to have been, then I figured part of an understanding of the situation was in going back, rereading correspondence, and the gradual build-up to the break between McClellan and Lincoln.

Q. Is it a fact that McClellan, far from being connected with the radicals was one of the principal opponents of the radicals?

A. Yes, probably. I am talking of accusations, not of —

Q. So that when you said that he was connected with the radicals, the exact opposite was the truth?

A. I said he was said to have been connected with the radicals. I believe that.

Q. Said by whom,

A. That I can't judge. * * *

279 (p. 167) There are duplicate copies of one book.

"The Diary of a Public Man" is a little more directly relevant. The personalities and actions of many characters involved in the assassination are 280 (p. 168) brought out quite clearly. I used it definitely for the members of the Cabinet. Whom? I can't tell off-hand.—I don't think I can pinpoint any particular person here that became directly used. The book deals with the period preceding and following the first inauguration of Lincoln. I don't know if many respectable historians

regard this work as one of fiction. I don't know who the public man of our day is.

284 (p. 172) When you stated that this pile of books was pertinent, I meant to say that it gave me some background material.

285 (p. 173) On J. E. B. Stuart:

"That is one of quite a few books there dealing with the Southern viewpoint of the war.

286 (p. 174) In "Wearing of the Gray", there is nothing specific connected with my article. I can say without looking.

287 (p. 175) The "Statistical Record of the Armies of the U. S." I used a little more directly in checking of statistics. I remember using the chronolized list of battles.

288 (p. 176) I can't remember any direct material. If I did, it was not in the final manuscript.

289 (p. 177) From "The Footprints of Time" I used
290 (p. 178) the dates of the incidents at the time. (p. 178) We have Lincoln's Cabinet here, and I never could remember who was in that Cabinet. I can't tell when Stanton became a member. It was after he had sent Cameron to Russia. Of his assistants I only recall Dana.

292 (p. 180) I cannot remember the relevance of "The Secret Service" by Richardson.

294 (p. 182) The book was actually published before
295 (p. 183) the assassination, I think, (p. 183) but it dealt with earlier assassination rumors.

296 (p. 184) I used this book as very good background material.

297 (p. 185) As to the "Photographic History of the
298 (p. 186) Civil War" in 10 volumes I can't answer at the moment but I suspect I used it.

Regarding Volume IX "Poetry and Eloquence",
300 (p. 188) on p. 128 there is a reference to the days following the assassination.

(Quoting a speech.) It is part of an article on the Southern viewpoint. * * *

301 (p. 189) Q. You say this Southern viewpoint article is by Charles Francis Adams?

A. Yes.

Q. Wasn't he the Northern minister to England during the Civil War?

A. I don't know. He could be. * * *

The Witness: Oh, no. I see—it is a tribute to Lee, and I said Southern viewpoint. I see it is a New England tribute to Lee, the title of the article, so it is not a Southern viewpoint. * * *

303 (p. 191) I was soaking myself in the background.

306 (p. 194) Grant was important in connection with my article, because someone—possibly not Booth—followed Grant and Mrs. Grant, sat at the next table, dogging his footsteps. I believe this was cut out.

307 (p. 195) George Bryan was the author of "The Great American Myth." I don't know if he wrote anything else. I never checked up on its authenticity. I really think he credits Dr. Eisenschiml for some of his material, and doesn't actually present new material. It was
308 (p. 196) simply taken from Eisenschiml, so far as I know. That material was only a small part. I do not know if he got permission from Eisenschiml to use his material. I hoped my article would appear in a por-
309 (p. 197) tion of a book. In that case, I probably would have required my notes and references.

310 (p. 198) Ralph Daigh of True, editorial director, did not tell me that they intended to use my article in book form.

311 (p. 199) My notes were destroyed by myself prior
312 (p. 200) to publication of the article, about one year before. (p. 200) I have all my notes on the July 1947 article, but no others.

313 (p. 201) For my article I used as original source material, (aside from other books), newspapers and
314 (p. 202) papers from the archives, and that could hardly be called original, because I am sure it has been worked over by a great many others.

I believe I read Eisenschiml's book "Why" twice. Once when I got it, and six years later as part of preparation for my article. I don't believe I marked any passages, I am not in that habit.

316 (p. 204) (Millard's copy of Eisenschiml's book "Why was Lincoln Murdered?" marked Defendant Exhibit #1 and Shadow #2)

317 (p. 205) There may have been notes in respect to Eisenschiml's books in the box (which was burned by me).

320 (p. 208) Roughly, I recall it was last summer that I learned of Eisenschiml's claims of infringement.

322 (p. 210) Fawcett forwarded me a note saying "Here is the first beef we received. Will you do something about this guy?"

I don't recall if it was the Mason letter.

The subject was not on my mind since then.

324 (p. 212) It is incorrect that I did considerable research in the Eisenschiml library and in his private files. I did credit Eisenschiml with the source of
325 (p. 213) something which was cut out—one particular item—

326 (p. 214) —"O.E. probably the worlds leading authority on the mysteries of the Lincoln assassination". That is general credit.

327 (p. 215) I had general correspondence with the editor Tom Naughton over the progress of my work. • • •

328 (p. 216) Q. I show you Defendant's Exhibit 2 for identification, being the manuscript of your article, 135 typewritten pages reduced to 119 by pencil, and

329 (p. 217) ask you to examine it (handing it to the witness).

Referring only to the passages in the manuscript which were cut out by the defendant, were any of those cut out passages copied from Dr. Eisenschiml's books?

A. Yes. • • •

(Witness is asked to look at p. 7 of the manuscript, to the passages beginning "What did Ward Lamon know or suspect that he never revealed?")

I have no idea now where I got that material.

(Witness is shown copy of Shadow and is asked if he got it there.) Not consciously, but we have identically the same sentence here.

330 (p. 218) (Witness is shown p. 7 of the manuscript, a sentence beginning "There had been for example the scheme of Confederate scout Thomas N. Conrad to kidnap Lincoln . . ." going to the sentence "Conrad was convinced that no one of his party had betrayed him." I don't know where I got that material.

(Witness is shown pp. 12 and 13 of Shadow and asked if he got it there.)

I am afraid I can't say. I don't know.

330 (p. 218) (Witness is shown p. 8 of the manuscript, "The police and the papers identified the disturber as a drunken lunatic named Thomas Clemens", and is asked where he got it.)

331 (p. 219) I am trying to think, I have a vague feeling

332 (p. 220) that probably is wrong, but something I have been been reading within the last 4 or 5 days—and, I have not opened these books since the time of this . . .

(Witness examines papers.)

This is a false lead, as I suspected.

(Finds where he ran across it—)

333 (p. 221) That is not my original source.

I did not actually get it from that book.

334 (p. 222) I do not know where the material appeared in source form.

(Witness is shown p. 9 of the manuscript, a passage beginning "All was in readiness")

I can't tell you where I got that.

(Witness is shown p. 14, Plaintiff's Exhibit 1, Why, pp. 44, 45; and in Shadow, pp. 362, 363.)

336 (p. 224) It is a possibility that I got the material from the Eisenschiml books, but I would not say a fact,—there are other sources. I think Sandburg.

337 (p. 225) Undoubtedly, I read every page of Sandburg's 4 volumes, including p. XVII of the foreword:

("The liberal researches of O.E. on the closing scenes of Lincoln's life are a distinct contribution; his failure to prove the main implied thesis of his book Why (Little, Brown, 1937) does not invalidate his other work in revealing the melancholy role of the muddle of John F. Parker and of other figures in drab")

I know that Sandburg derived that material from Eisenschiml.

341 (p. 228) When I mentioned during my testimony that I derived certain things from Sandburg, I meant things which Sandburg in turn derived from Eisenschiml.

342 (p. 229) I believe with no exception except in Dr. Eisenschiml's case, did I use anything that I didn't find at least in two and usually in 4 other sources. Whether they credited one another or not was not the point. The only cases not mentioned anywhere else except in Eisenschiml's books were the O'Beirne papers and the use of the Camden and Amboy schedule.

344 (p. 231) My understanding has been, and I am
345 (p. 232) afraid still is, pending change, that any incident of history, which is generally written about by several writers is a fact of history available to all. I never believed that a man can stifle history through having discovered it. If, on the other hand, it is an item like the O'Beirne papers or the Camden and Amboy schedule, it is a particular bit of knowledge, which Eisenschiml got with considerable effort and expense, that until it is generally written into popular history, it is somewhat his property.

347 (p. 234) I shall pick out the Sandburg sources I used, those which do not come with the credit given by Sandburg to Dr. Eisenschiml.

Quote 8, That would not fall under the Eisenschiml credit. My feeling is that Sandburg did not credit Eisenschiml with this.

348 (p. 235) In the case of Quote 13, 14, and 15 regarding the life of Parker, I would guess that probably comes under Dr. Eisenschiml's credit.

349 (p. 236) That is probably true wherever Sandburg used Parker material. It is a fact that nobody, prior to Dr. Eisenschiml, gave the Parker story in detail or used the Parker records.

Quote 21 I would say does not come under
351 (p. 238) that credit in the Sandburg book. In this I may be wrong.

As to Quotes 34 and 34a in reference to Parker, I imagine they fall under the Eisenschiml credit.

352 (p. 239) If they do not, they should. I never heard of its being used prior to Dr. Eisenschiml.

Quote 42, regarding Paine's strength, I would say would not come under Eisenschiml's credit. I would guess that was a little more generally used. That completes the Sandburg references.

It is my understanding that when one or more history books refer to factual material, I have the right to
353 (p. 240) use that material without looking at the original sources. I would say three or more, without any basis.
355 (p. 242) I would say that publication in a newspaper would automatically make it public property.
358 (p. 245) I did not actually see the Richmond Whig.
359 (p. 246) (Witness is asked to look at pages 10 and 11 of his manuscript, Defendant Exhibit #2, to the paragraph, "Did Lincoln Himself Know or Guess His Fate? There is more than a hint that he did. . . ."
360 (p. 247) "And a few days before walking out of the office of Secretary Stanton, Lincoln and his guard Thomas met a heavy stranger.")

I cannot answer where I got that language or material. I have a feeling that there are sources for that, but
361 (p. 248) I can't pin them down.

(Witness is asked to read p. 19 from Plaintiff's Exhibit #2.)

This does not refresh my memory, and I did not necessarily get it there.
362 (p. 249) (Witness is asked to look at p. 17 of the manuscript). I have a sneaking hunch probably that is Eisenschiml's inspiration. I think probably it was.

(Witness is asked to look at p. 32 of the manuscript.)
365 (p. 252) and then to pp. 10 and 11 of Plaintiff's Exhibit #2) I don't recall that I got my material from pp. 10 and 11. This is not a denial.
366 (p. 253) (Witness is asked to look at p. 38 of his
367 (p. 254) manuscript.) That language I would consider my own, but the source—one place, I think is Sandburg.
369 (p. 256) I never looked at any of O'Beirne's papers. I never looked at Mrs. Lincoln's letter to him.

370 (p. 257) (Witness is asked to look at p. 42 of his manuscript.)

371 (p. 258) The thought was undoubtedly inspired by Dr. Eisenschiml.

(The witness is asked to look at p. 57 of his manuscript.)

372 (p. 259) The language is mine. The idea, I think, is an inspiration from Dr. Eisenschiml.

376 (p. 263) (Witness is asked to look at page 58 of his manuscript to this passage:

"It would be exceedingly interesting to know the name of the bellhanger who was so busy with other orders that he had the audacity to incur the ire of the all-powerful Secretary of War by postponing the repair of what was then the most important door bell in Washington.")

377 (p. 263A) That is a direct copy from Dr. Eisenschiml, of course, since I am quoting from him; not only the idea, but the language.

378 (p. 264) I think my understanding was that I would not have to ask Eisenschiml's permission to use that passage.

I did not ask Eisenschiml's permission to use anything from his books.

379 (p. 265) I have felt that a person who makes use of a fact of history in a literary work, use of that fact is not by any means given permission of it as a personal thing. It is my understanding that if Eisenschiml or anyone else used factual material I could use it, and under the terms you are referring to here, without going to the original source.

381 (p. 267) In some cases I used inferences or surmises or conclusions of Dr. Eisenschiml in my article without directly or indirectly quoting or crediting him.

382 (p. 268) I deny very strongly that I used his language. I allowed Dr. Eisenschiml's curiosity to awaken mine, and in many cases I reached the same conclusions.

384 (p. 270) I don't think that in the article as published I take any exceptions to any of Eisenschiml's conclusions or surmises, but I won't make an arbitrary "no" on that.

386 (p. 272) (It is stipulated that Dr. Eisenschiml is the outstanding, leading authority in the world on the assassination of Abraham Lincoln.)

387 (p. 273) I would even add adjectives to it in 1953 that I hadn't thought of in 1947.

388 (p. 274) (Witness is asked to look at page 58 of his manuscript and reads.)

The language, always, is right from me. The idea, I believe, came from Dr. Eisenschiml.

390 (p. 276) (Witness is asked to read from page 77 of his manuscript.) The idea, I think I can positively say was Dr. Eisenschiml's.

391 (p. 277) (Witness is asked to read more from page
392 (p. 278) 77.) I got the language from myself. The idea behind it I rather think is almost an obvious conclusion.

393 (p. 279) I won't accept as a fact that Eisenschiml was the only one to point out that the wires out of Washington were grounded and not cut.

396 (p. 282) (Witness is asked to read from page 88 of the manuscript.)

397 (p. 283) I got that language from me. The material I link in my mind with an investigation. I don't think it came from Eisenschiml. I cannot really recall.

398 (p. 284) After looking at page 81 of Plaintiff's Exhibit I, I am convinced I got much of this from the investigation of the Judiciary Committee of the House in 1867.

(Witness is asked to read from page 80 of his manuscript.) I got that language from myself, and
399 (p. 285) the material from Baker.

(Witness is asked to read from page 98 of Plaintiff's Exhibit I.) This does not change it. I did not get it from Eisenshciml.

(Witness is asked to read from page 80 of his manuscript.)

401 (p. 287) I am trying to think. I can't remember my source on it now. I don't think it was from Dr. Eisenschiml's books. Chapel Point is on the lower peninsula of Maryland somewhere, not too far from Port Tobacco.

402 (p. 288) If you tell me it is not on any map except in Eisenschiml's book, I will probably accept it as a fact.

407 (p. 293) (Witness is asked to read from page 88 of his manuscript.)

408 (p. 294) The language is mine. The use of the wrong picture is Dr. Eisenschiml's discovery. I realize where I got the material and the idea was from Dr. Eisenschiml. (Witness is asked to read from p. 264 of Dep. top)

409 (p. 295) Well, there is a similarity of language.

410 (p. 296) (Witness is asked to read from page 92 of his manuscript.) That language is mine. The material
411 (p. 297) I probably got from Dr. Eisenschiml.

(Witness is asked to read another part of page 92 of his manuscript.) I got that from myself, and
412 (p. 298) the material from Pitman. I don't think I got it from Eisenschiml.

414 (p. 300) (Witness is asked to read from page 98 of his manuscript.) I got that language from myself.

415 (p. 301) As to the material, I am vague, but I would guess Eisenschiml.

(Witness is asked to read from page 100 of the manuscript.) I don't know where I got the mate-

416 (p. 302) rial, I did not get the language from Dr. Eisenschiml. I am not sure whether I got the material from Eisenschiml.

(Witness is asked to read from page 132 of his
417 (p. 303) manuscript.) I got that language from myself. The material came from the archives of the Congressional Globe, I believe.

418 (p. 304) (Witness is asked to read from pages 142 and 143 of Plaintiff's Exhibit #I.)

It does not change my recollection. It just shocks me a little. I did not get the language consciously from Dr. Eisenschiml, whether unconsciously, I could not say.

I see a similarity here more than I will admit on
419 (p. 305) most others. It is not a copy, but there is a similarity there, and a rather shocking one to me.

(Witness is asked to read from pages 132, 133 of his manuscript.)

I got the material from the Congressional Globe and the reports of the Investigating Committee. Whether
420 (p. 306) Eisenschiml inspired my curiosity, I could not say. It is quite possible.

(Witness is asked to read from page 133 of his manuscript.) I got the language from myself. I think the idea was put into my mind by Dr. Eisenschiml.

421 (p. 307) (Witness is asked to read from pages 151 and 152 of Plaintiff's Exhibit #I.) The language is mine. The material I think came from Dr. Eisenschiml.

(Witness is asked to read from page 133 of his
422 (p. 308) manuscript.) I got that language from myself, the idea from Dr. Eisenschiml. The material I found in some published work of Wood.

423 (p. 309) (Witness is asked to read from page 289 of Plaintiff's Exhibit #I, and page 187 of Exhibit #2.)

424 (p. 310) It is obvious that my recollection was wrong. The material came from here. I am not aware that I

ever saw the issues of the Washington Gazette. I am quite sure I did not and that this was very directly derived from Eisenschiml.

425 (p. 311) I was mistaken, but not in regard to the language.

426 (p. 312) I submitted the manuscript with the almost sure knowledge that half of it would be cut out, but not which half.

I never corrected proofs.

427 (p. 313) Tom Naughton, the editor, told me that parts of it were going to be cut out.

428 (p. 314) I got Quote I from Father Chiniqui's book.

429 (p. 315) Quotes 1, 2, 3, are combined on my card. Quotes 2 and 3 were found and seen in Washington in the records of an investigation.

430 (p. 316) I raised quite a storm about the deletion of my references to Dr. Eisenschiml. I talked about it to Tom Naughton well before this suit came up.

432 (p. 318) I don't believe I have any correspondence on that subject.

Quote #7. As I said, it was from Dr. Eisenschiml's reproduction of the time table. I don't know that it is nowhere else in existence.

433 (p. 319) In general terms the time and unpleasantness of the trip was brought out by General Porter.

435 (p. 321) Eisenschiml is the only source for Grant's time of arrival.

I never saw the Macon Daily News of April 26, 1865. My sole knowledge of it came from Eisenschiml's books.

436 (p. 322) This is Quote 28.

I don't know why it did not get the story until April 26. I gathered it was not sent to them.

437 (p. 323) I don't know that the office of the paper had been raided.

I don't believe I saw the Richmond Whig of April 1865.

I never saw the Middletown Whig Press of April 14, '65, but I learned of its contents in connec-
438 (p. 324) tion with the investigation I mentioned before. I believe it was Butler's Committee. I can't give the specific reference.

All I have on my cards is that it was either the archives or the Globe. However, I would not have looked for it as enthusiastically if I had not had Dr. Eisen-
439 (p. 325) schiml's curiosity. It is a very hazy recollection, I am not positive about the Congressional Globe.

I never looked at the Newburgh Journal.

I did see the New York Sun of February 11, 1917,
440 (p. 326) some time in the summer of 1952, in the New York Library. Now I am not going to be as positive that I saw the New York Sun there.

441 (p. 327) Possibly my source was simply Eisenschiml's book.

444 (p. 330) I did see the Washington National Republican of June 8, 1865, to the best of my recollection, in the Library of Congress, I don't know when, but I think back in 1945 or 46.

445 (p. 331) Apparently I did not use anything from the National Republican in my article except what was quoted in Plaintiff's Exhibit #I, on pages 23, 24, 25.

446 (p. 332) I can't remember some of the works in which I saw Mrs. Lincoln openly accused of complicity in the murder.

447 (p. 333) I never saw the original letter from Mrs. Lincoln to O'Beirne.

I never saw the police blotter in Washington relat-
448 (p. 334) ing to the assassination.

I never saw the original of Forbe's statement that
449 (p. 335) he was in the box that night, except in Eisenschiml's books. I saw it there prior to the writing of my article.

I don't think I ever saw the Riddle papers, and I don't know where they are.

452 (p. 337) I can't answer whether I read the Magazine of History of February 1911, until I can find it here. (Quote 26.)

453 (p. 338) I believe I did. I don't remember where. I believe I read it.

456 (p. 341) I am not able to answer whether I read Document #9, House of Representatives, 39th Congress. Eisenschiml was one of my sources. It is not a fact that my sole knowledge came from Eisenschiml's book.

457 (p. 342) L. J. Velasquez was a woman spy. I don't know where I saw her book.

458 (p. 343) I would not have any memory whether the italics appeared in the book. I put mine in for a specific purpose.

459 (p. 344) I have no recollection what else besides what is quoted in Shadow Velasquez says in regard to the assassination. I have no recollection what else she says, I don't know how long a book it is. I don't know where it was published, or when. (Looking it up) It was

460 (p. 345) published in New York in 1890.

I don't remember any chapter headings.

I don't remember with any clarity at all any particular incident, except one of a skirt full of Quinine being smuggled, and another in connection with Baker's arrest

461 (p. 346) of a minister. Now that may not be from the book. That may be from Baker's book.

I find nothing to indicate that I saw the Washington Sunday Gazettes of October 28, and November 3, 1883.

462 (p. 347) It is not a fact that my sole knowledge of their contents is derived from Eisenschiml's books, but I don't where else I saw it. I saw many papers. It is quite possible I am mistaken.

464 (p. 349) I remember that a promise of clemency was held out to Mrs. Surratt, but not the source, except that a statement was made to her daughter. I can't tell you by whom. I have no recollection where I got it. I remember one source was Stefan Lorant.

465 (p. 350) I don't even know the reference. I don't know if Lorant is considered an expert in the field. I
466 (p. 351) don't know if he is simply a collector of photographs.

The only time I have ever seen a copy of Mrs. Lincoln's letter to O'Beirne is in Dr. Eisenschiml's book. It was quoted in Sandburg, but the only place I saw a facsimile . . .

Do I have a bartender Michael Henry? I don't know
467 (p. 352) where I got the references.

468 (p. 353) I don't know that the name of the bartender is mentioned only in the O'Beirne papers.

(Witness is instructed by Mr. Martineau not to answer certain questions.)

469 (p. 354) I believe I got the information that Booth had relatives in Manchester, New Hampshire, from the reports of the Butler investigation, which I saw either in the archives—or in the Congressional Library.

I don't know whether I read the Boston Sun Post of April 11, 1915.

470 (p. 355) I probably did not see it.

471 (p. 356) Apparently the story of what Eckert was doing that night (contained in the Boston Sun Post) is not in the "Great American Myth".

(Quote 45.) I got the exact quote from Dr. Eisen-
472 (p. 357) schiml. The facts, without the quotes are found in other sources.

473 (p. 358) It is not a fact that the story of the men on crutches appears exclusively in the O'Beirne papers, I don't know where else, but I can say definitely that is not a fact. I don't know if I read the Atlantic Monthly for April 1930. (Quote 9.)

475 (p. 359) I know of other accounts of what Stanton did that night. Oldroyd, p. 53.

I don't know yet where else I got the idea that Booth fired his shot at 10:13 P.M. I would doubt it very much that the only place where that hour is given is in the Eisenschiml books.

476 (p. 360) I have no idea whether I read the Baltimore American of 1902.

477 (p. 361) I think in some few cases I found material
478 (p. 362) which I put on the various cards, which actually were not source material for the original manuscript at the time I wrote it.

I tried chiefly to recall what I did the first time, and put down as closely as I could some of the material. I also depended on the affidavit of Dr. Eisenschiml.

I said what I could find that was recalled to my mind by the statements made in the affidavit.

479 (p. 363) I do not recall that anyone at Fawcett's, prior to the publication of my article, asked me about sources or credits. I think it was mentioned that my article should be submitted to noted Lincoln historians.

480 (p. 364) Some one in the office said, "This is what we
482 (p. 366) ought to do." I have no way of knowing what they did.

True has a very loose way of commissioning. If they approve the idea and you write it successfully enough, it is not an order or a commision. It is merely an
483 (p. 367) approval in advance.

485 (p. 369) The reason I destroyed my notes was that after I put in 4 or 5½ months of toil, I decided that the amount of work to do a book would never pay out.

488 (p. 372) Oh, I got some of my material from the Eisenschiml books. It is possible that I was not aware of that.

489 (p. 373) I don't think language.
492 (p. 375) When I said that Eisenschiml's books are packed with his own sensational discoveries, I meant Dr. Eisenschiml is a very fine man and I think everyone should read his books.
494 (p. 377) I did not mean entirely the items in para-
495 (p. 378) graph 20 of his affidavit and subparagraphs A to O, because I don't think some of these items are his discoveries.

I would say items L, (Parker), I, J and G are his discoveries, none other.

497 (p. 380) As to paragraph 19 of Eisenschiml's affi-
499 (p. 382) davit, and subparagraphs A to II, I would say items G, H, I, N, T, U, V, GG, HH, and II.
500 (p. 383) I meant nothing further than a tribute to Dr. Eisenschiml, that he is a great man.
501 (p. 384) When I wrote that he came upon a shocking find, that was an item.

I did not refer to Eisenschiml in the 1953 article be-
502 (p. 385) cause I was cramped for space, and magazines don't run bibliographies.

I do not see any similarity in language between the two Quotes #1.

503 (p. 386) As to language in my Quote 2, I imagine I was born with it.
504 (p. 387) It is not a paraphrase of Eisenschiml's language.

In Quote 3 none of the language is taken from Eisenschiml.

505 (p. 388) My Quote #5 is not taken from Quote 5 of Eisenschiml.

Nor is that of Quote 11.

Nor is that of Quote 12.

506 (p. 389) I am afraid that the words "only three" in both quotes are similar.

As to Quote 13 none of my language came from Eisenschiml's Quote 13, not "profane, coarse and insolent
507 (p. 390) language" as compared to Eisenschiml's "violent, coarse and insolent."

The language of my Quote 14 was not taken from Eisenschiml, including "kicked by a man he was trying to arrest".

I did not take Quote 20 from Eisenschiml.

508 (p. 391) I did not take any of his language in Quote
509 (p. 392) 29, including "rushing out, he quickly wired his paper."

I did not take my language of Quote 34 from Eisenschiml, including "Lizzie was promptly discharged."

I did not take Eisenschiml's language on Quote 34A and Quote 35, except the quotes within the quotation
510 (p. 393) marks.

I did not take "That close O'Beirne came to making the capture then" from Eisenschiml. I have no opinion on whether the language is almost identical. I know how it happens to be similar, because we were speaking
511 (p. 394) of a very small point there, and one is rather limited in the language that can be applied.

I did not take from Eisenschiml my language on
512 (p. 395) Quotes 36, 37, 39.

I do not know whether I found other diaries besides those of Bates and Browning. There was a good deal of language in there; I used only the quotes.

513 (p. 396) My reason for quoting Bates first was to build to a climax. So I would use the more emphatical one further on.

I did not take my language of Quote 40 from Eisenschiml.

There is no explanation why in describing the farm,
514 (p. 397) I used the same items as Eisenschiml.

515 (p. 398) I did not take Eisenschiml's language on Quotes 50, 51. We were both trying to prove the same

point and that was the only statement that applied to it.

516 (p. 399) I did not take Eisenschiml's language on
517 (p. 400) Quotes 52, 55, 56, 57, 58, 59, 60. I don't recall what else Stanton said at that time and place.

I took none of Eisenschiml's language in my Quotes
518 (p. 401) 62 and 64. I have not had the opportunity to find where I got the 10:13 hour.

Referring to Quote 17, I don't know who besides
519 (p. 402) Eisenschiml and myself referred to the fact that Forbes was not called as a witness.

Re Quote 27. I took nothing there from Eisenschiml
520 (p. 403) except the figure 17 (persons).

Re Quote 44. I do not know anyone else except Eisen-
521 (p. 404) schiml and myself who made the observations in that form.

Re Quote 49. I have no idea whether anyone else besides Eisenschiml and myself faced the facts in that way. I rather think they did.

523 (p. 406) Re Quote 52. I don't know at the moment if anyone else besides Eisenschiml and myself made such common sense observations on that point.

Re Quote 58. I have not since found better sources
524 (p. 407) for this Quote.

Re Quote 60. I am still stuck on that item.

525 (p. 408) Quote 61. I certainly saw the ads on p. 60 of Plaintiff's Exhibit #1 in the Washington Evening Star.

I don't remember whether in the same place, or
526 (p. 409) on what page, nor the size of that paper, nor the number of columns per page.

I don't recall what other newspapers were published in Washington at that time.

527 (p. 410) I do recall seeing the playing up of Grant's presence in other places besides Eisenschiml and

myself, but I have no notes on it. It happens I have. Both Oldroyd and Harris commented on it.

Re Quote 65. I do not recall anyone else besides
528 (p. 411) Eisenschiml and myself making that glaringly obvious observation. I have been vainly trying to recall the telegram Baker sent to Eckert. It is not in Baker's book, and I doubt if it is in the Official Records.
529 (p. 412) I consider Carl Sandburg a Lincoln expert,
530 (p. 413) also James G. Randall, Paul H. Buck, Jay Monaghan, Douglas Freeman, T. Harry Williams, Dr.
531 (p. 414) Bullard. I have never seen George Bryan recorded as an expert.
532 (p. 415) At the time I wrote the article I lived in Westwood, New Jersey. It has a nice small library, not a Civil War library, but with some remarkably good books.
533 (p. 416) The library facilities in Saratoga are very good within certain limitations. Has pretty good Civil War material from the southern side. There are no Civil War manuscripts in Sarasota or Tampa, and probably none on Lincoln's assassination.
534 (p. 417) My last trip to Washington was in 1949. I divided my time between the Archives and the Congressional library.
535 (p. 418) I consulted at the archives with a lady, whose name I don't recall. I worked there with David
536 (p. 419) Rankin Barbee at the Library of Congress I worked from the files.
537 (p. 420) I got a good deal of material from the Washington trip. My article was an outgrowth of an earlier story, "The Devil's Errand Boy" the material for which would also be used for the Lincoln field.
538 (p. 421) I did considerable research in Chicago, in the Historical Society.

539 (p. 422) I have a sneaking notion I got the Velasquez book there, but I am not sure.

I also did research in New York's Public Library.

541 (p. 424) I corresponded with Eisenschiml only on one occasion. He wrote me a very nice letter, telling me that the material I had sent him was new to him, and that he hoped I had the curiosity and energy to dig for material.

542 (p. 425) (The letter is marked Plaintiff's Exhibit #5.)

543 (p. 426) I saw Dr. Eisenschiml only on one occasion.

544 (p. 427) I don't recall the date. It took place in his library. I was there no more than 2 hours. I took no

545 (p. 428) notes. I looked at no manuscript or newspaper.

547 (p. 430) I was educated at Canby High School, Canby, Minnesota. I have no academic degree. On the subject of Lincoln and the Civil War. I published "The Spy Who Saved the Union", "The Devil's Errand Boy", "America's Greatest Unsolved Murder" and a large number of minor pieces.

548 (p. 431) One book of mine will be out in July, and

549 (p. 432) I have one unpublished manuscript, a short story on Brady, photographer in the Civil War.

I never made a comparison between Pitman's and Poore's reports on the [Conspiracy] trial in the original testimony. I did in the bound volumes.

I probably knew as a child that there was a mystery about Lincoln's death.

550 (p. 433) I cannot connect it with any particular book or incident.

They asked questions about it twenty-four hours after it happened.

I got the idea that Parker was a key figure from almost

the same time. There was a movie, The Birth of a Nation, in which his part was played up.

551 (p. 434) I recall no source for it.

I got the idea that there were premature reports on Lincoln's death simultaneously from Eisenschiml's book and another. Here again I am badgered by my memory; if it were better, I could recall other sources.

552 (p. 435) My attention was first called to this by one of the books I was reading. I cannot say whether
553 (p. 436) that or Dr. Eisenschiml's alerted me first.

The discrepancy between Grant's Memoirs and his
554 (p. 437) actual doings were, I believe, cued to me by Dr. Eisenschiml.

I saw the significance of Stanton's refusal to let Lincoln have Eckert as a bodyguard the first time I discovered he had asked for it. I don't think I got that from Dr. Eisenschiml.

Let me refresh my recollection whether anyone besides Eisenschiml and myself had pointed it out. Quotes
555 (p. 438) 10 and 11 edge around it, but not directly.
556 (p. 439) I am afraid I have no references that would refresh my memory beyond that point.
556 (p. 439) It was directly Dr. Eisenschiml who made me examine the false statements of Rathbone and Harris.
557 (p. 440) I believe, but I don't recall exactly, that I expressed the idea in my article that Booth apparently was protected. I cannot answer specifically,
558 (p. 441) but the natural inference is that he could only have escaped by the connivance of someone with authority.

Re paragraph 21 of the Eisenschiml affidavit, sub-
559 (p. 442) paragraphs A to J, I recognize only one as historically inaccurate, when I inadvertently typed

Stanton instead of Seward. I made no mystery of Sergeant Dye's testimony.

561 (p. 444) I don't know whether all one could see through that gimlet hole was Lincoln's chair and part of his head, but I see no reason for thinking so. In Harpers Weekly of April 29, 1865 it is stated that the hole "was sufficiently large to give his eye a wide range."

562 (p. 445) I believe that specific statement is made in "The Great American Myth", that in many reports, possibly in newspapers, it was said the assassin could not possibly have been Booth. I could not recall any other specific one.

563 (p. 446) I don't know that Payne did not know the way to Surrattsville.

On the face of it, I know no other place where "the gin-soaked prostitute" was mentioned as being under suspicion.

564 (p. 447) I used it for dramatic effect rather than historical accuracy.

It is a generally accepted fact that the Radicals, and Stanton in particular, stood to gain by Lincoln's death. It also was the subject of a book "Lincoln and the Radicals".

565 (p. 448) I don't recall whether it has an acknowledgment to Eisenschiml. The argument was the cause of the impeachment of Johnson. Innumerable quotations could be found on that score.

I would not know the number of magazine articles on the assassination between 1865 and 1939. I made an attempt to read all I could locate.

566 (p. 449) I can't recall specifically if any of them gave the same surmises and conclusions that Eisenschiml gave in his books. I would be inclined to say yes.

567 (p. 450) I refer to Gleason's piece, for example. I

believe Crook lashed back at some things, if I am not mistaken.

568 (p. 451) I don't recall stating in my affidavit that all statements were "checked and double checked". The full context is "There is not one statement contained in my article which has not been checked and double checked through every available source."

I meant that I made every effort to find the source.

569 (p. 452) I did not look at secondary works where primary sources were available. I believe I could say without error that the only statements I did accept without being able to at least prove the existence of primary sources were a couple I took from Eisenschiml, because I simply wouldn't think of questioning his veracity on any of this matter.

But in every other case I am positive that I determined that sources existed even though they might not have been available to me at the moment.

I knew that police records existed at one time. Where they are now, I have no idea. I made no effort to

570 (p. 453) check the original police records, I simply relied on Eisenschiml.

I seemed to have missed the footnotes mentioning the O'Beirne papers. I had placed most of the statements therein as also being available through other sources.

Redirect Examination of Mr. Millard
by Mr. Martineau.

This array is books is 10% or less of my library on the Civil War period.

571 (p. 454) Many of them were bought after I had written the two pieces we talked about, but I didn't begin to buy the books with those articles in mind. The

acquisition of my library was the result of my interest in that period.

572 (p. 455) I consulted other books also in connection with the article in controversy here, and took notes from them.

573 (p. 456) I have been a free-lance writer for the last 16 years. I did not go to college for lack of funds. I went to work within a month or so out of High School, clerking in a grocery store.

574 (p. 457) Some time after I went into the advertising business in Minneapolis. I was advertising manager of two small trade journals. I was then about 19 years old. During that time I sold my first article.

I did copyrighting in connection with that advertising work.

575 (p. 458) Then I was a space buyer in St. Paul. In 1931 I was laid off. That was two days after my marriage. I then sold and serviced oil burners.

576 (p. 459) After that brief period I made my first important sale of a piece of writing.

I then moved to Mount Morris, Illinois, where I was editor of a magazine, selling an occasional story. I practically wrote the whole magazine, leaving me little

577 (p. 469) time for outside writing.

After 9 months the magazine was moved to Chicago where I stayed 6 or 6½ years. I went into writing in earnest and also opened an advertising and public relations office.

578 (p. 461) I wrote mostly trade articles. After some 5 years I plunged into free-lance writing, which I have done ever since, from 1936 on.

579 (p. 462) I have sold at least 1000 stories. I have two in the current issue of Blue.

581 (p. 464) I ran across a piece of evidence in my favor. In "The Devil's Errand Boy" I quote Baker,

"He asked where he was captured". I said 'near Port Conway'. As near as I can determine in neither of his books does Eisenschiml include that portion of the remarks. I got it out of the Congressional Record.

582 (p. 465) I am sure I picked items G, I, J, and L from paragraph 20 of Eisenschiml's affidavit, and they are the only ones. I may be wrong.

583 (p. 466) I feel that these items originated with him, so far as I know. He was the first person, to my knowledge, who ever called my attention to them.

I did not feel I was poaching on his reserves. Quite the opposite, because my understanding has been that Dr. Eisenschiml wrote his books for the express purpose of arousing curiosity.

584 (p. 467) I felt that he was hoping that such would occur in the case of every reader.

589 (p. 467) Re Paragraph 19 of Eisenschiml's affidavit, paragraphs G, H, I, N, T, U, V, X, GG and HH.

585 (p. 468) I disagree very strongly that they were material presented for the first time in his two books, and that they were copied, plagiarized, infringed and pirated by the defendant.

Item G. I could only say that he was the first to call it to my attention. I used that in my work. I also called attention to that fact. In doing so I did not feel that

586 (p. 469) I was poaching on Eisenschiml's preserves.

When I called attention to Grant's evasiveness, I felt that I was merely mentioning a historical fact.

587 (p. 470) Re Sub-paragraph H, "Proof that Grant's excuse for leaving Washington was unfounded." Dr. Eisenschiml was the first to call my attention to it.

In my cross-examination I quoted some authority that Mrs. Grant feared being insulted by Mrs. Lincoln.

588 (p. 471) I think that would be part of an excuse not to go to the theater party. I think deeper than that

would be his own position of either having to defend his wife against his commander-in-chief's wife or stand by like an ass while his wife is insulted.

589 (p. 472) Re Item I, the time table of the Camden and Amboy R.R., I stated Dr. Eisenschiml was the first person who discovered and reproduced the actual table. It is the first one I saw.

590 (p. 473) In telling about it I felt that I was stating a historical fact, and was not stealing something from Dr. Eisenschiml.

I did not feel that he was the only person who had the right to say that that train left at 2:58 P.M.

I got the impression, when reading his books, that he would want other scholars to report the same historical facts.

Re Subparagraph N. "The contradictory and evasive statements of Major Rathbone and Miss Harris." I

591 (p. 474) stated that that was the first I had ever been aware of that. I took it as historical facts.

Re Subparagraph T. "The willful changes made in the official records of the trial, made by Pitman and Burnett." I think that including the word "willful" he is the first historian who called attention to those changes.

593 (p. 476) He cited the original manuscript in the archives and the original manuscript of Pitman's record, also Pitman's printed book. I didn't look at the actual manuscript, I did not try to get at it. I took Dr. Eisenschiml's word for it.

I regarded it as a statement of a historical fact by a reliable historian, documented by an actual photo-

594 (p. 477) graph. I have not see the original shorthand notes of the Pitman record.

Re Subparagraph U, "the fact that the pursuit of

595 (p. 478) Booth was not undertaken in the right direction, and that the War Department neglected to follow

Booth's trail after Fletcher's report."

As to the first part, Dr. Eisenschiml is the first to call that to my attention. The second part is not an original. It is a fact of history plus his inferences on facts already known.

596 (p. 479) When you say that Dr. Eisenschiml was
597 (p. 480) the first person to say, "This is not chasing him [Booth] in the right direction," it makes it sound much simpler, because the records are so damnably mixed up, and there was such a mass of orders and counter-orders, that it takes a very shrewd mind to cut through that maze and arrive at the obvious conclusions.

Eisenschiml had the shrewd and analytical mind to penetrate that maze.

I understood he was stating a historical fact plus his excellent inference from it. I would say that every scholar would be forced to use it or write what is now known to be an untrue piece of history.

Re item V. "The fact that the blotter of the Tenth
598 (p. 481) Street police station in Washington contained the names of witnesses and their statements". I have never seen the blotter.

599 (p. 482) No one knew, prior to Dr. Eisenschiml, that the blotter contained that. Dr. Eisenschiml was the first to look at it.

Re sub-paragraph X "Stanton's delay in broadcasting Booth's name until too late to reach the morning edition", the fact was known. Eisenschiml was the first to put an interpretation on it.

601 (p. 484) He was the first person, in my opinion, to lay the delay to intent rather than confusion; that there was method to the alleged seeming madness, the first to draw that inference from these historical facts.

602 (p. 485) It would become a historical fact. Re sub-paragraph GG, "That the 'tobacco barn' in Garrett's

farm had more than one door". Dr. Eisenschiml was the first to call it to my attention. It was known many years before he wrote his books.

603 (p. 486) I saw the Confederate Veteran story. I don't recall when. I was trying to think whether I was persuaded to read it by having found out what was in there through Eisenschiml's books, or whether I came upon it in running down everything pertaining to the subject.

604 (p. 487) It is quite possible that I was alerted to that fact by reading Eisenschiml's book.

606 (p. 489) Re sub-paragraph HH. "Lafayette Baker's determination to catch Booth, or substitute another body for it".

607 (p. 490) Eisenschiml was the first to call it to my attention. I had probably never heard about this amazing fact until I read it in Eisenschiml. He told me about it.

608 (p. 491) I cannot recall whether nothing is italicized in the original Velasquez. I have only the word of Eisenschiml and Mr. Gertz on that, but I am willing to accept it.

609 (p. 492) In all these matters on which I have been questioned, and which I said were Eisenschiml's discoveries, I meant that he was the first to call them to my attention. And then I either verified it or else took his word for it. But I did not copy his language.

I was pretty tired last night after having been on
610 (p. 493) the witness stand about 7½ hours.

611 (p. 494) I saw the Velasquez book the last time in either 1945 or 1946.

612 (p. 495) I said this morning that when I came up here to testify, I used the Eisenschiml affidavit to reorient myself, to see what he was claiming. I had
613 (p. 496) to push back into my mind that whole mess

when I did that manuscript. I could not afford it,
614 (p. 497) so I may not have even, this second time, used the same sources that I did originally. That I can't remember.

Mr. Gertz asked about these cards. They were also done in connection with just being able to testify more rapidly and efficiently in regard to these 66 items.

There are 66 cards, plus a few additional ones.

615 (p. 498) I figured if I found one or two authorities on which I could rely, that I had sufficient. I think I put some material on those cards which was not source material for my article. It directly pertains to the items, but was not necessarily original source material.

616 (p. 499) I can see no objection to having those cards marked and have Mr. Gertz examine them.

617 (p. 500) (Marked Defense Exhibit #7.)

(Mr. Martineau stated: Exhibit #7 is a packet of cards prepared by Mr. Millard so that he could readily refer to first his source material on the 66 items in dispute, and the cards corresponding to Mr. Millard also contain some material which he had not heretofore used as source material for his article.)

618 (p. 501) I may or not be able to pick out those cards which were not used as source material. I did not actually use the Philadelphia Inquirer transcript, I did not know it existed. I included it, but only as additional source. I don't think that Private O'Reilly book was used. I am not sure.

619 (p. 502) If I had not prepared these cards, I would have had to run to the library for every question asked me.

620 (p. 503) I made no attempt to memorize the language or form of expressions used in any of the books! In case of a telegram or letter I made notes.

621 (p. 504) I should say I did not consciously or unconsciously memorize Eisenschiml's language.

Re Quote #35, the Cox business, the only place
622 (p. 505) where I saw the exact words from the O'Beirne diary were the passage in Eisenschiml. I have never seen the diary, but the fact, as distinguished from the expressions, was stated by many other authorities.

I feel that Eisenschiml was stating a historical
623 (p. 506) fact. Yesterday I said I was shocked at some material in your manuscript when my attention was called to p. 143 of Plaintiff's Exhibit #1.
624 (p. 507) Now I can't see why I was shocked. I don't even see anything close at all.
626 (p. 509) My memory is that the facts are in Baker's book.

It is a preposterous statement to say that Dr. Eisenschiml is the first man who advanced the idea that there was a mystery about Lincoln's death. There was a Congressional investigation.

627 (p. 510) Further, it was bruited about that a lot of higher-ups might have been implicated. It is this which led almost directly to Johnson's impeachment.
628 (p. 511) I think Dr. Eisenschiml himself would not claim that he solved the mystery of Stanton's possible implication. He is very careful about that. He only pointed out the way . . .

Chapel Point is referred to in Baker and Homer Bates.

630 (p. 513) I did not prepare any cards to cover those parts of my manuscript which were cut out.
631 (p. 514) My attention was called by Mr. Gertz to p. 70 of my manuscript, the sentence beginning with "What did Ward Lamon know that he never revealed?" Then he called my attention to p. 21 of Plaintiff's Exhibit

#2. This is where I made my remark that I was shocked, but maybe not. Anyway, the first sentence is "What
632 (p. 515) did Lamon know that he never told?"
I did not copy the language.

Re-Cross Examination of Mr. Millard
By Mr. Gertz.

I had first had any conversation with Mr. Martineau with respect to my testimony on the day the hearing opened. It lasted not over 3 hours at the most.
633 (p. 516) I had a few conversations with Mr. Flannery, none of very long duration, for a total of probably two hours. I had no talks with any attorneys from the time of the complaint to the time of the hearing.
634 (p. 517) The substance of my affidavit was taken from a letter I wrote to Mr. Flannery, which he returned, substantially as I had written it, in the form of an affidavit. Yes, I have written at least 1,000 articles and stories in the last 16 years.

From the standpoint of a writer, I allow myself
635 (p. 518) a lot of time for research. From the standpoint of Dr. Eisenschiml, very little time.

I don't know exactly how many articles I wrote since 1951.

I did not write to anyone at all for permission to use any material in connection with my article.
637 (p. 520) I knew when I wrote my article that the Eisenschiml books were copyrighted. I understood copyright to mean two different things. In the field of history, a legal protection to a writer against copying his words and expressions, not facts which were in existence before him, and over which he had no control.

I thought at the time I wrote the article that I had the right to use any factual material found in copyrighted books without looking at the original sources.

(Hassan's Stranger's Pocket Compass, marked Plaintiff's Exhibit #6.)

638 (p. 521) There is nothing whatever in this Exhibit #6 which tells what the schedule of the Camden and Amboy Railroad was in 1865.

642 (p. 525) The pile of books, magazines and newspapers on the ledge in this office are some of the publications I used when preparing myself to write the story. Many of them are background material.

644 (p. 527) In fact, I doubt if there are a dozen books
645 (p. 528) here that are directly pertained to the points of the assassination brought out here, but the assassination was only a climax.

I am sure I didn't say that prior to Eisenschiml's books many publications linked Stanton to the assassination. Higher-ups, yes.

646 (p. 529) Many newspapers did, the Congressional Globe and the Butler Committee. Vice President Johnson was about as high as you could go in the government.

647 (p. 530) There was a considerable split of opinion as to whether Dr. Eisenschiml was a research genius or a man who had gone off the deep end and was trying to document a weird idea.

I would say many historians regarded his writings as novel and original.

648 (p. 531) I don't believe I would consider Eisen-
649 (p. 532) schiml's books as unique, so far as the assassination is concerned.

In addition to the 66 or 67 items in Exhibit
650 (p. 533) and the items in paragraphs 19 and 20 of the Eisenschiml affidavit, there are other historical facts common to my article, to the Eisenschiml books and others.

In all instances I attempted to examine original sources.

In many instances I was unable to without taking a lot of expensive trips to the places where that source material was.

I did not just sit down and take Eisenschiml's books
651 (p. 534) and appropriate this without running down any original sources. I spent several months in running them down, wherever possible.

To me a historical fact is an incident that occurred, a person who lived, or publication of a newspaper, a pamphlet, a magazine, the fact of a book.

I include historical facts, inferences or surmises
652 (p. 535) drawn from factual material, because most history begins as inference, and without it there would be no curiosity, no research. But do not include the language in which they are set forth.

DEPOSITION OF RALPH DAIGH.

Direct Examination by Mr. Gertz

664 (p. 3) My name is Ralph Foster Daigh.

I live at 1405 Pelham Manor, New York.

I am editorial director and vice-president of the Fawcett Publications, Inc.

I have been vice-president for about four years and editorial director for about 16 years.

I have complete responsibility for editorial material for Fawcett Publications, including the magazine True.

665 (p. 4) My duties at the time of issuing the February 1953 issue were not different.

To my knowledge I did not read Millard's article prior to publication and had nothing to do with it being commissioned.

666 (p. 5) The first time I was aware of the manuscript was when I read the comments and the synopsis of our readers.

667 (p. 6) (Synopsis and reader's comments are made Plaintiff's Exhibit 3, 3/26/54.)

669 (p. 8) Millard's manuscript was edited and cut by our managing editor, Thomas J. Naughton.

670 (p. 9) The other two comments are by Charles Barnard and Ken W. Purdy.

671 (p. 10) I don't know with certainty whether Millard submitted his article without a commission.

672 (p. 11) I don't know what, if anything, was done by anyone connected with Fawcett as to checking sources and credits on Millard's article.

673 (p. 12) Mr. Naughton and possibly Mr. Purdy would know.

I had not read Eisenschiml's two books before pub-
674 (p. 13) lication of Millard's article. I do not know if anyone here took steps to determine whether Millard had taken anything from Eisenschiml's books. Mr. Naughton, and possibly Mr. Purdy would know.

Mr. Naughton deleted the reference to Mr. Eisenschiml,

675 (p. 14) No one else to my knowledge.

I discussed this deletion with Mr. Naughton and Mr. Millard after receiving your letter.

I do not know if Mr. Naughton discussed it with Millard.

677 (p. 16) I have personally sort of compared Millard's article with Eisenschiml's books,

678 (p. 17) a few pages, and could find no valid reason for the complaint.

679 (p. 18) After publication of the article I received a letter from a friend of Eisenschiml. I think his name was Mason. I replied to it.

Martineau: We will stipulate that he replied and that a photostatic copy of the reply is attached to Eisenschiml's affidavit as par. 24.

680 (p. 19) Mr. Gertz: I call your attention to paragraph 2 of that letter, reading:

"You are probably right that Dr. Eisenschiml should have been credited in the piece that Mr. Joseph Millard did on Lincoln's death."

To which credit did you have reference?

Witness: To the fact that Eisenschiml's name had been mentioned in the unedited version, and that that
681 (p. 20) mention had been removed.

I only had reference to the part that contained Eisenschiml's name.

683 (p. 22) My recollection is that I showed Mr. Mason's letter to Millard. He told me about the deletion of Eisenschiml's name. He also saw no basis for any
684 (p. 23) complaint by Eisenschiml, and expressed regret that his name had been eliminated.

He also told me that he had seen Dr. Eisenschiml in his library and spoke glowingly of the conversation with him and that he was permitted to inspect the library and spend some time there.

685 (p. 24) I have no recollection as to his mentioning Eisenschiml's private files in which he had done research, nor why I chose the words "private files". He characterized Eisenschiml as "cooperative".

686 (p. 25) To my knowledge he did not request permission of Dr. Eisenschiml to use any of his material.

Yes, my conversation with Millard was the source of what I wrote in paragraph 3 of my letter to Mr. Mason.

687 (p. 26) Millard mentioned to me his hope of having the entire manuscript published in book form. I don't know whether he discussed this with anyone else connected with True.

There never was to my knowledge, a discussion
688 (p. 27) on this between myself and anyone connected with Fawcett Publications.

(On the following questions there was no answer given by witness.)

Q. What was the average circulation of True for January 1953?

Q. True for March 1952?

689 (p. 28) Q. For the year 1953?

Q. How many words are there in the Millard Article?

Q. How long was the original manuscript?

As to what kind of cover goes on the magazine I have a voice, and so has the editor and the art director.

On the February 1953 issue it was worked out between myself and Naughton. I had the responsibility.

690 (p. 29) The Millard article was the only one in that issue we described as a book length feature.

(Copy of True of January 1954 was marked Plaintiff's Exhibit #4, 3/26/54.)

691 (p. 30) That cover is a form which has been used for three consecutive years on the January issue and

692 (p. 31) is composed of the covers of the preceding 12 or 11 issues.

That at the top of this cover was the February 1953 issue I noticed for the first time. These covers are arranged in a color pattern for the best eye-appeal.

693 (p. 32) I do not know why the references to Carl Sandberg were not omitted.

694 (p. 33) *Cross-Examination of Mr. Daigh by Mr. Martineau.*

696 (p. 35) In magazines of the True type, it is not customary to furnish documentation as in an historical work.

The number of manuscripts purchased by Fawcett's in 1952 and 1953 would run into the thousands.

The reason for printing the headline "America's Greatest Unsolved Murder" on the cover is this: We hire research people to determine for us what makes people buy magazines, and we found that an unsolved murder has better than average salability.

697 (p. 36) You will notice that there is no mention of Lincoln; the public is not as interested in a story of Lincoln as they are in an unsolved murder.

Redirect Examination of Mr. Daigh
by Mr. Gertz

Gave title to article so that it would sell.

698 (p. 37) It is our policy to the best of our ability and to the limits of practical practice to check everything for accuracy that appears in True.

699 (p. 38) We purchased Millard's manuscript on February 2, 1952.

The material started to go to the printer about three to four months before it went on the presses.

700 (p. 39) We went to the presses in December 1952.

702 (p. 41) Mr. Gertz:

Q. Do you have any department at Fawcett's which determines prior to publication whether there are any copyright infringements in an article or manuscript?

703 (p. 42) Witness: We have a wonderful machine for that called an editor.

It is part of his function, but I must add that even more important is the reliability, honesty, known integrity of the contributor.

703 (p. 42) Mr. Gertz: Because you had published Millard's articles before, you assumed that there was no infringement?

Witness: Not only had we published them, but other publishers had, and to my knowledge there never has been a legitimate complaint.

704 (p. 43) The defendant relies on the warrantee of the author as to originality of the article.

705 (p. 44) In cases of dispute or intelligent doubt, we certainly do make a check, but it would be physically impossible to examine everything printed.

710-711 • • •

712

INTERROGATORIES PROPOUNDED BY PLAINTIFF AND DEFENDANT TO MRS. JOSEPH J. MILLARD

(Filed Nov 22 1954)

The plaintiff and defendant above named hereby request, in accordance with Rule 31 of the Federal Rules of Civil Procedure, that you make answer to the following interrogatories before Mary Secor, a Notary Public at large in and for the State of Florida:

Direct Interrogatories Propounded by the Defendant, Fawcett Publications, Inc.

1. What is your full name and present address?

2. Are you the wife of Joseph J. Millard, the author of an article entitled "The World's Greatest Unsolved Murder"?

3. If the answer to interrogatory 2 is "Yes", please answer the following:

4. When were you married?

5. How many children do you have?

6. When was "The World's Greatest Unsolved Murder" written by your husband?

713 7. Where did your husband write said article?

8. What state and city were you living in at the

time your husband wrote said article?

9. Did you own the house that you were living in at that time?

10. How long did you live in that city and state?

11. Where did you move from that city and state and when did you move?

12. If you owned your house in that city and state, did you sell it at the time you moved?

13. If your answer to 12 above is "Yes", did you store any of the personal property, furniture and other miscellaneous property that you removed from your house when it was sold?

14. If your answer to 12 above is "Yes", did you destroy any of the personal belongings, furniture or furnishings that were removed from the house that you sold?

15. If the answer to 14 above is "Yes", what was destroyed? Please describe in as much detail as possible the items destroyed.

16. If the answer to 14 above is "Yes", please state how the material in question was destroyed.

17. Did you have a conversation with your husband, Joseph J. Millard, concerning the property to be removed to Florida, property to be destroyed, and the property to be placed in storage?

18. If your answer to 17 above is "Yes", please state the place and time of that conversation.

714 19. If the answer to 17 above is "Yes", please state whether or not you said to your husband during the course of that conversation that you were glad to see him give up writing historical pieces.

20. If your answer to 14 above is "Yes", please state whether or not it was agreeable with you that your husband destroy the material that was destroyed.

715

CROSS-INTERROGATORIES PROPOUNDED BY THE PLAINTIFF, OTTO EISENSCHIML, TO MRS. JOSEPH J. MILLARD (WITHOUT PREJUDICE TO OBJECTIONS TO DIRECT INTERROGATORIES

(Filed Nov 22 1954)

1. Were you ever present at any meetings between your husband and Thomas J. Naughton at any time prior to the publication of your husband's article in the February 1953 issue of True?

2. If the answer to cross-interrogatory 1 is "Yes", please answer the following:

3. When and where did such conversations or conversation take place and who were present?

4. What was said by each person present at each of the said times and places?

5. Were you ever present at any meetings between your husband and Ralph Daigh at any time prior to the publication of your husband's article in the February 1953 issue of True?

6. If the answer to cross-interrogatory 5 is "Yes", please answer the following:

7. When and where did such conversations or conversation take place and who were present?

8. What was said by each person present at each of the said times and places?

716 9. Were you ever present at any meetings between your husband and Ken Purdy at any time prior to the publication of your husband's article in the February 1953 issue of True?

10. If the answer to cross-interrogatory 9 is "Yes", please answer the following:

11. When and where did such conversations or conversation take place and who were present?

12. What was said by each person present at each of the said times and places?

13. If you or your husband destroyed any of your personal belongings when you moved from the city in which he wrote the article published in the February, 1953 issue of "True", when did you destroy them?

14. Did you make an inventory of all or part of the belongings destroyed by you or him?

15. If the answer to cross-interrogatory 14 is "Yes", where is that inventory?

16. Is it possible for you to compare, as to size or bulk, the belongings destroyed with the belongings not destroyed?

17. If the answer to cross-interrogatory 16 is "Yes", please make such comparison—state the size of the belongings destroyed as contrasted with the belongings not destroyed.

18. At the time you destroyed the said belongings, were there any public warehouses or storage facilities available in your community?

19. What was the bulk or volume of typed or handwritten material that was destroyed?

20. How did it compare in bulk, size or volume with the books or other printed material that was not destroyed?

21. Have you discussed these interrogatories and cross-interrogatories with your husband?

717 22. With the attorney or attorneys for "True" or Fawcett Publications, Inc.?

23. Have you discussed your husband's deposition with him?

24. As to the typed or handwritten material that was destroyed, was it prepared, arranged or filed in any systematic fashion?

25. If the answer to cross-interrogatory 24 is "Yes", describe in detail the manner in which the said material was prepared, arranged or filed?

718

DEPOSITION OF MRS. JOSEPH J. MILLARD ON WRITTEN INTERROGATORIES AND CROSS-INTERROGATORIES

(Filed Dec. 3, 1954)

The examination of Mrs. Joseph J. Millard on written interrogatories and cross-interrogatories, in a certain cause now pending in the United States District Court For The Northern District of Illinois, Eastern Division, wherein Otto Eisenschiml is Plaintiff and Fawcett Publications, Inc., a Delaware corporation, is Defendant, was held in Room 316, Palmer First National Bank and Trust Company Building, Sarasota, Florida, on Monday, the 29th day of November, A. D. 1954, beginning at 10:00 o'clock A. M., at which examination there was present the witness, Mrs. Joseph J. Millard, and the undersigned Notary Public, Mary Secor.

The witness, Mrs. Joseph J. Millard, being first duly sworn and put on oath, answered the interrogatories and cross-interrogatories propounded by the parties to this cause as follows:

ANSWERS TO INTERROGATORIES

Answer in interrogatory No. 1: Amy Leone Harrington Millard. 2462 Belvoir Boulevard, Sarasota, Florida.

719 Answer to interrogatory No. 2: Yes.

Answer to interrogatory No. 3: .....

Answer to interrogatory No. 4: February 14, 1931.

Answer to interrogatory No. 5: One.

Answer to interrogatory No. 6: I can't say.

Answer to interrogatory No. 7: As nearly as I can recall part of it in Westwood, New Jersey, and part of it in Sarasota, Florida.

Answer to interrogatory No. 8: Well, if it was written at this period when I say it was I was in Westwood, New Jersey and Sarasota.

Answer to interrogatory No. 9: The house we lived in in Westwood, New Jersey, yes.

Answer to interrogatory No. 10: Well never for a consecutive time. We were back and forth from about 1941 until we sold the house.

Answer to interrogatory No. 11: We moved to Quakertown, Pennsylvania. A farm, and I believe that would be 1943.

Answer to interrogatory No. 12: Yes.

Answer to interrogatory No. 13: Yes.

Answer to interrogatory No. 14: I don't recall that I personally did. No.

Answer to interrogatory No. 15: I destroyed nothing personally.

Answer to interrogatory No. 16: .....

Answer to interrogatory No. 17: I presume we discussed putting things in storage and leaving behind anything we didn't want only I don't actually recall any conversations on that line.

720 Answer to interrogatory No. 18: I am afraid I couldn't.

Answer to interrogatory No. 19: I don't recall that remark, no.

Answer to interrogatory No. 20: I'm sorry I don't know that he destroyed any. I presume he did.

ANSWERS TO CROSS-INTERROGATORIES

Answer to cross-interrogatory No. 1: No.

Answer to cross-interrogatory No. 2: .....

Answer to cross-interrogatory No. 3: .....

Answer to cross-interrogatory No. 4: .....

Answer to cross-interrogatory No. 5: No.

Answer to cross-interrogatory No. 6: .....

Answer to cross-interrogatory No. 7: .....

Answer to cross-interrogatory No. 8: .....

Answer to cross-interrogatory No. 9: No.

Answer to cross-interrogatory No. 10: .....

Answer to cross-interrogatory No. 11: .....

Answer to cross-interrogatory No. 12: .....

Answer to cross-interrogatory No. 13: As I recall we did not destroy them. At least I did not.

721 Answer to cross-interrogatory No. 14: No.

Answer to cross-interrogatory No. 15: .....

Answer to cross-interrogatory No. 16: No.

Answer to cross-interrogatory No. 17: .....

Answer to cross-interrogatory No. 18: Well, there are warehouses but as I say I don't recall destroying them. I repeat.

Answer to cross-interrogatory No. 19: That is something I wouldn't know.

Answer to cross-interrogatory No. 20: I wouldn't know.

Answer to cross-interrogatory No. 21: At least I was going to be questioned.

Answer to cross-interrogatory No. 22: No.

Answer to cross-interrogatory No. 23: I wouldn't say I actually discussed it, I have heard him tell parts of it.

Answer to cross-interrogatory No. 24: I would say I wouldn't know.

Answer to cross-interrogatory No. 25: I couldn't.

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722-731 • • •

REPORT OF PROCEEDINGS

Direct Examination of Virginia M. Goldberg by Mr. Elmer Gertz.

("Why Was Lincoln Murdered" received as Plaintiff's Exhibit #1)

("In the Shadow of Lincoln's Death" received as Plaintiff's Exhibit #2)

(True Magazine for February 1953 received as Plaintiff's Exhibit #3)

My name is Virginia M. Goldberg. I live at 4461 North Murray Avenue, Milwaukee. I was employed by Otto Eisenschiml in connection with the gathering of material for the books Exhibits #1 and #2, from about December 1932 to some time in 1940. I am a niece of Otto Eisenschiml, and was employed as his secretary, research-worker, stenographer, librarian, and took care of other people needed in the work on the books. I received at the beginning 30¢ an hour, and worked up to about $25.00 a week.

There were a number of other employees. One Charles Tyng worked in Washington, studying newspapers and working on a timetable. There was a Dr. Helene Lemberger, who did research work in the library.

There were Sally Owens and Sally Holmes, a girl in Philadelphia and one in Vermont. There were a number of girls from Eisenschiml's office, and one Vivian Bolotin.

I worked at the University of Chicago, at Newberry Library, the Chicago Historical Society, the Public Library. I organized the filing system, documents, pictures, newspapers, etc. I assigned others to certain projects, wrote letters, got permission to use material.

13 In most instances I had written reports from the people who were researching. • • •

20 I sent orders in for newspapers, letters, pictures,
21 to autograph collectors, and to houses where we pur-
22 chased documents. Prices of newspapers ranged from one to five dollars, some $20.00. We bought pictures.
23 Then we purchased the O'Beirne papers, which cost about $1,000.00.

24 We took trips, to Washington in 1933, to the War
25 Department, with my mother, found a file of the
26 evidence taken at the Conspiracy Trial. I think there was a second trip.

At the Police Department we saw the blotter, and
27 we went to Ford's Theater. We followed the Booth
28 [escape] route. (An album of photographs is shown and marked Pl. Exh. #4.) Most of these pictures were taken on this trip by Otto Eisenschiml, while I was present.

29 We went to Cleveland, for the Riddle papers. We
31 read and abstracted them.

32 Mr. Eisenschiml paid all expenses. In Pittsburg we went to see Mr. Doster, whose father was an attorney in the Conspiracy Trial. We read and took with us some of his papers.

33 Then we went to see Mrs. Peddicord in connection with a lock of hair from Booth; then to Brooklyn to see a man who had a collection of theatrical material.
34 Then there was a trip to Lansing, Michigan, to see a
35 son of Lt. Baker, and to Springfield, Illinois, and to Kansas City.

Cross Examination of Virgini Goldberg by Mr. J. B. Martineau.

36-39 I would prepare notes for Eisenschiml to take along. I have no notes in my possession.

41 I cannot approximate the total sum Eisenschiml paid for the research and other work.

45 The file in the War and Navy Building was about 3 feet tall, 12 inches wide. Everything was in disorder.

46 I filled at least four note books with notes.

Re-direct Examination of Virginia Goldberg by Mr. Gertz.

50 The photostats of documents we gathered completely
52 filled a filing cabinet drawer. We had pamphlets
53 photostated at fifty cents a sheet. (A ledger of Eisen-
57 schiml expenses is marked Plaintiff's Exhibit #5.) I think the figures in there are correct.

Re-cross Examination of Virginia Goldberg by Mr. Martineau.

60 The ledger was prepared by accountants. It refreshed my recollection.

63 (Plaintiff's Exhibit #6 received without objection —a request by plaintiff for admissions.)

65 (Plaintiff's Exhibit #7 received without objection— affidavit in support of plaintiff's motion for summary judgment.)

68 (Plaintiff's Exhibit #6A identified—defendant's partial response.)

71 (Plaintiff's Exhibit #8 is received without objection.)

73 (Plaintiff's Exhibit #8A is identified.)

74 (Plaintiff's Exhibit #9 is received, without objection.)

76 (Plaintiff's Exhibit #9A is identified.)

78 (Plaintiff's Exhibit #10 is received without objection.)

79 (Plaintiff's Exhibit #11 is received without objection.)

80 (Stipulation that the court is to rule on the various requests for admissions and interrogatories.)

82 (Plaintiff's Exhibit #12 is received without objection.)

83 (Plaintiff's Exhibit #13 is received without objection.)

83-84 (Plaintiff objects to certain portions of Daigh depositions.)

85 (Plaintiff's Exhibit #14 is received without objection.)

89 *Direct Examination of Dr. Donald H. Riddle by Mr. Gertz.*

I live at 239 South Bruner Street, Hinsdale, Illinois. I am head of the Division of Social Sciences at the University of Illinois, Chicago Undergraduate Division. My primary field is teaching American history, done for the past six years. I have been a teacher for 32 years.

90 Prior to that I was in the field of New Testament history and literature. This included textual history, studies in the synoptic problem of the Gospels, literature of New Testament, early church history.

It also included comparison of text or language, word for word.

91 It includes the working out of literary relationships so that similarities and differences may be seen.

91-96 I made this kind of comparison between Eisenschiml's books and Millard's article. The same skills are involved in this kind of comparison. I read the books and article, made a comparison of the language, marked similarities. I found 13 identical passages there, from 97 13 to 33 words, in a total of 85 parallelisms.

(Copy of Millard's article on which Dr. Riddle worked is marked Plaintiff's Exhibit #15)

98 (Dr. Riddle's list of identical passages marked Plaintiff's Exhibit #16.)

99 The first identical passage is:

"Crook, do you know, I believe there are men who want to take my life . . . and I have no doubt they will do it."

(24 identical words)

100 Next: "I know one one could do it and escape alive. But if it is to be done, it is impossible to prevent it."

(23 identical words)

101 "I am thinking . . . he would be the kind of man to go with me this evening. May I take him?"

(20 identical words)

"Then I shall take Major Rathbone along . . . But I would much rather have you, Major, since you can break a poker over your arm."

(25 identical words)

"Provost Marshal James R. O'Beirne: This is to

102 certify that John F. Parker, a member of the Metropolitan Police, had been detailed for duty at the Executive Mansion by order of Mrs. Lincoln."

(33 consecutive identical words)

". . . saying that it was a man riding on horseback that had shot President Lincoln."

(13 identical words)

"No, sir. It did not at the time seem to be sufficiently important."

(13 identical words)

"I am pretty certain that we have assassinated the

103 President and Secretary Seward."

(13 identical words)

"Sam'l Cox. His mill servant states that Cox

had been cooking provisions lately and carrying it to persons down in the swamp."

(21 identical words)

"I intended to have his body, dead or alive, or a mighty good substitute for it."

(16 identical words)

"The most extraordinary document I ever read, under the name of a law opinion."

(14 identical words)

104 ". . . The Commission was without authority, its proceedings void. The execution of those persons . . . will be murder."

(16 identical words)

"Upon a consultation with the Secretary of War and the Judge Advocate General, it is thought advisable that no action be taken in regard to the arrest of the supposed John Surratt at present."

(33 identical words)

107 (Plaintiff's Exhibit 17 received—the 85 parallels and identities.)

108 (Plaintiff's Exhibit 15 received — Dr. Riddle's marked copy of Millard article)

111 I am now reading my first parallelism, which is on page 37 of Millard. (Reads)

112 I am reading from page 25 of Shadow. (Reads)

(These are Quotes #2 and #3 in Plaintiff's Exhibit C, attached to Plaintiff's Exhibit 7, the 66 Quotes of Parallels.)

113 I am now reading Millard, page 105, paragraph 1,
114 beginning with "Only Stanton" to "finally arrived." (Reads)

Compare with Why, page 4. "Stanton did not" . . . to colleagues."

(This is the same as Quote 59.)

115-170 (Witness next reads the full passages in both authors' works from which the Quotes or Parallels were taken in Exhibit C of Plaintiff's Exhibit 7 marked, respectively, Quotes #4, #6, #7, #8, #9, #10, #11, #12, #13, #14, #15, #16, #17, #18, #20, #21, #22, #64, #65, #23, #26, #25, #24, #28, #29, #30, #31, #40, #33, #34, #34A, #48, #35, #49, #36, #50, #51, #53, #39, #55, #56, #57, and various identities not included in Exhibit C.)

170 (Witness temporarily excused so defendant may take the testimony of Mr. Naughton.)

Direct Examination of Mr. Thomas J. Naughton by Mr. Martineau.

172 My name is Thomas J. Naughton, I live at 15 Ridge Road, Thornwood, New York, and am a magazine
173 editor, now with Argosy, formerly with True, where I worked from February 1946 to May 1954. I was associate editor. I scheduled stories, wrote titles and
174 blurbs, edited copy, etc. I became managing editor in 1952. Millard article went to press in Dec. 1952 and on sale Jan. 20, 1953.

175 (Original manuscript of Millard's article marked Defendant's Exhibit #1 of 11/18/54. This is the same as Defendant's Exhibit #2 in connection with Millard's deposition.)

176 Probably in the middle of '51 I suggested to Mil-
178 lard that Lincoln's assassination might make a good
179 story. He had done two booklengths for us on the Civil War. From one of those ("The Devil's Errand Boy") I got the idea. The next I heard from him I got the manuscript. I had to cut it from 40,000 to about 20,000 words. I discussed no specific cuts with

him, but got his permission to cut. I sent it around office for comments and then to Mr. Daigh for purchase.

180 (Defendant's Exhibit #2 marked—the same document as Plaintiff's Exhibit #3 in connection with Daigh deposition—a comment sheet of editorial readers).

181 The story was approved by three readers, and ap-
182 proved for purchase by Ralph Daigh. We kept it around longer than usual, because we wanted to hold
183 it for the February issue. I had heard of Dr. Eisen-
184 schiml. Nothing was said at any time about checking the manuscript for copyright infringement. We re-
184-8 garded the writer as reliable.

(Various questions and answers with respect to fate of infringers objected to and stricken.)

186-8 (That part of Millard's deleted manuscript, which deals with Eisenschiml, is now read.)

189 The deletion was not intended as a particular slight to Eisenschiml. The only reference to Eisenschiml was in connection with an anecdote.

190 It is not customary to publish references or sources in a magazine article. (Objection.)

191 True had a circulation of one and one-half million men readers—a mass audience.

192 It is unusual for True to be cited as an historical authority, but it has been.

Cross Examination of Mr. Naughton by Mr. Gertz.

My editing of Millard's 1947 article was routine.
193 Millard never told me not to cut any particular pas-
195 sages. I edited the July 1947 issues containing the
197 Millard article on Baker. I may have mentioned to him the complimentary references to Eisenschiml in
his 1947 article in the conversation from which grew the
1953 article.

I did not ask him what "sensational discoveries of Dr. Eisenschiml's [mentioned in there], he had had in mind." Nor, so far as I know, did anyone else at True.

I had not read any books about the assassination.
200 My knowledge is derived from Millard's story.
201 So far as I know, no one at Fawcett, including myself, consulted with any Lincoln experts regarding Millard's article.
202 After reading the comment of one of the readers [who suggested submission of the article to Lincoln experts] there was a casual and brief discussion about it. It was concluded not to submit it.
202-203 Neither I nor anyone else at True took steps to prevent copyright infringements on Millard's article.
204 We depended on the reliability of Millard. Nobody at Fawcett or True checked sources and credits in
205 connection with the Millard article. The 1947 article
207 of Millard made a lasting impression on me. I might have mentioned to Millard that his article on the assassintaion might make a good book.

Re-direct Examination of Mr. Naughton by Mr. Martineau.

213-214 I never before heard of Millard being accused of a copyright infringement. (Objection)
216 The signing of the usual form by Millard (Def. Exh. 3 for identification) warranted the originality of the article before we accepted it.

Mr. Gertz: Objection.

The Master: Sustained. He doesn't know anything about his unblemished reputation, or anything of that kind.

Direct Examination of Dr. Donald W. Riddle (Continued) by Mr. Gertz.

219 I receive no compensation for testifying or other services in this case. I am not related to Eisenschiml. I received my education in Evanston, at the University of Chicago, at Heidelberg and Harvard.

220 I have degrees of Bachelor of Philosophy, Bachelor of Divinity, Master of Arts, Doctor of Philosophy. I began teaching at Kimball College in Salem, Oregon, in 1922. In 1923 I taught at the University of Chicago, and again from 1926 to 1942. In 1924 and 1925 I again taught at Kimball. I was in the army from 1942 to 1946. From 1946 to present I have taught American history at the University of Illinois.

221 I have published "Jesus and the Pharisees", "The Martyrs", "Early Christian Life", "Paul, a new Biography", [and many others] and "Lincoln Runs for Congress." I have almost ready for publication "Abraham Lincoln, Congressman", I have also published about forty articles of a scholarly nature. I belong to the American Historical Association, the Mississippi Valley Historical Association, the Illinois State Historical Society, etc.

222 I have read all of the principal literature on Lincoln biography and have exhaustively worked the sources
223 in my own field. I am familiar with Eisenschiml's reputation among Lincoln experts and American historians.

224 Eisenschiml's reputation among Lincoln experts and American historians as to originality is that these two books under consideration were the product of original research, with the result that new and important findings were contained in them.

225-226 My opinion is—they appear to me to be highly original.

230 The Master: From your reading, as much as you have read, with reference to the death of Lincoln, have you an opinion as to whether these [two books by Eisenschiml] are original or whether they are comprehensive reaction of much that has gone before?

Dr. Riddle: They are highly original. • • •

232 No author prior to Eisenschiml voiced any suspicion that Lincoln's assassination was a northern plot.
Nor was the story of Parker ever told;
Nor that there were more than four persons in the box at Ford's Theatre;
Nor that Miss Harris and Major Rathbone made divergent statements,
Nor what the significance of this was;
Nor that Forbes had made a statement about his whereabouts on the evening of the assassination;
Nor that Stanton had
233 perjured himself as to Lincoln's last visit;
Nor what Stanton and Eckert did that night;
Nor that their excuses were untrue.
234 Nor that the War Department had known the identity of the conspirators for several weeks.
Nor that Grant's excuse for not attending the theatre was a sham.
Nor that Grant could have seen his children almost as early by taking the morning train.
Nor had the timetable of railroads connected with Grant's journey ever been given.
Nor had any author pointed out that Stanton willfully withheld the news of the assassination, nor why.
235 Nor that Gobright acted peculiarly
by killing one of his own wires.
Nor that the news was released too
late for the [early] newspapers to print it
Nor that none of the Washington

papers printed Booth's name.
Nor that the southern newspapers did not get
the news until Booth had presumably passed by;
Nor that the interruption of the wire service
236 was an inside job;
Nor that Booth's pursuit was misdirected
and his escape route was unpatroled.
Nor that Pitman deliberately mutilated the
official record.
Nor had anyone pointed out the peculiarity of
the clews left in Atzerodt's room;
Nor pointed out Gleason's part in the story;
Nor that O'Beirne had left a diary and
other papers.
237 Nor any author pointed out the advertisements about
Lincoln's visit to Ford's Theatre.
Nor did anyone wonder why Parker,
Forbes and Hanscom were not questioned;
Nor why Cox, Jones, Jett, Bainbridge and Ruggles
were not punished;
Nor that Stanton and Parker were dismissed
about the same time;
Nor did anyone mention the blotter at
the Washington Police Station;
238 Nor that Booth's shot was fired at
10:13 P.M.

242 *Cross Examination of Dr. Donald W. Riddle*
by Mr. Martineau.

243 I did not assist in the preparation of the parallel columns in Plaintiff's Exhibit 7. My undertaking was entirely independent. Mr. Gertz provided me with a copy of Millard's article and I worked on it at my summer home.

249 The fundamental purpose [of my task] was to determine the literary relationship, [between the two authors' work] if it exists.

250 You set out the same factual situation to see if there is a literary relationship.

It is not true that there is no ownership of facts of
251 history.

251 I spent about forty hours on the Parallels. I did it without guidance from anyone.

252 Mr. Gertz gave me a set of parallel columns, but made no reference to anything he had done. Nothing was said about compensation, and I expect none.

253 I was just interested in picking out similarities, not differences.

255 I confined myself to the four corners of the works in question. I did not examine the source.

257 My assumption would be that Eisenschiml parallels his sources closely.

258 In one instance I am perfectly sure that Mr. Millard did not consult the source he quoted—The Velasquez document [Quote 53]. The use of italics shows derivations from Eisenschiml, and not Velasquez.

261 The italicized emphasis is not different, in my judgment.

262 I would say . . t he derived that from Dr. Eisenschiml, not from Velasquez.

265 I deduced from the fact that Millard italicized somewhat the same words that he copied Eisenschiml instead of the original source.

266 If Millard testified that he read the original source and italicized the words to emphasize the substitution of a body, that could not affect my opinion.

267 As to Quote #15 [Mrs. Lincoln's letter]; In this instance Millard could not have obtained that from

the original source, because it was in Eisenschiml's possession.

268 By having the letter set up haec verba, it did not become an original source in any respect.

271 The 13 instances of extensive identical reference
272 convinced me of Millard's direct copying from Eisenschiml.

278 It is my conclusion that Millard copied the Crook quotation from Eisenschiml instead of from Crook.

282 To me Millard's quotation from Bates indicates that
283 he lifted it from Eisenschiml, and if Millard testified that he went to the original source, it could make no difference to me.

(Witness temporarily excused.)

284 *Direct Examination of Otto Eisenschiml by Mr. Gertz.*

285 I live at 2300 Lincoln Park West, am a citizen of the United States.

286 This photostatic copy of a letter from the Department of State is a true copy. (Marked Plaintiff's Exhibit 17 for identification.) (Objection to introduction of Plf. Exh. 17 sustained.)

288 (Mr. Gertz asks for admission of citizenship and that costs be charged for failure to admit. He says he made same request weeks or months before.)

289 I follow different lines of occupation. I am a manufacturer, a business man, an author and a lecturer, all professionally. (Lists his books.)

290 Most of my books pertain to the field of the Civil War and the death of Lincoln. The death of Lincoln is dealt with in "Why Was Lincoln Murdered?" "In The Shadow of Lincoln's Death" and "The Case of A. L.—Aged 56."

I have published quite a few magazine articles; some
291 in Coronet pertain to Lincoln's death. Also in the Journal of the Illinois Historical Association.

To the best of my knowledge I have read every piece on the subject of Lincoln's death that has ever been published. (Lists books on the assassination.)

295 My books differ fundamentally from previous ones.
296 The others are recitals of known facts, while I introduce new evidence.

298 There are also chapters in mine that pertain to the
298 motives underlying the assassination. I have been a student of the subject for about 35 years. My re-
299 search consisted of looking up new material from sources not tapped before, such as the War Department archives. I looked up autographs, unpublished letters, diaries.

300 I did considerable traveling between 1933 and 1941
301 in connection with my research. (Lists trips and tells what he did on each trip.)

303 I made an approximation of my expenses in connection with my research right after the publication of Why, and estimated the amount as about $20,000.00.
310 I do not recall the details.

311 To my knowledge no other author ever expressed a suspicion that Lincoln's assassination was a North-
312 ern plot, nor that Stanton and the Radicals expected to profit from his death;

Nor did any other author give the story of John F. Parker;

Nor that there were more than 4 persons in the box at Ford's theater;

313 Nor that Miss Harris and Major Rathbone made divergent statements;

Nor what this divergence signified;

Nor that Forbes made a statement of his whereabouts that evening;
Nor that Stanton perjured himself as to Lincoln's last visit to the War Department;
Nor what Stanton and Eckert did that night;
Nor that their excuses were a sham.
Nor that the War Department had previous knowledge
314 of the identity of the Conspirators;
Nor that Grant's excuse for not going to the theater was a sham;
Nor that Grant could have seen his children almost as early by taking a morning train;
Nor did the time table connected with Grant's trip ever appear before;
Nor that Stanton willfully withheld the news of the assassination; or why;
Nor that Gobright acted peculiarly by killing one of
315 his wires.
Nor that the news of the tragedy was released too late for the early morning papers;
Nor that the Washington papers did not dare print the name of the assassin;
Nor that the news of the tragedy was released too late for the morning papers to print it;
Nor that the Southern papers did not get the news until Booth presumably had passed by;
Nor that the interruption of the wire service was an
316 inside job, or was part of a plan;
Nor that Booth's pursuit was misdirected;
Nor that Pitman deliberately mutilated the official trial record;
Nor did anyone point out before the peculiarity of the clues in Atzerodt's room;
Nor Gleason's part in the story;
317 Nor that O'Beirne left a diary.

I owned that diary and his papers at the time of

publication. Neither had been published before, so far
318 as I know, nor Mrs. Lincoln's letter to him.
319 I never saw the ads in the Washington Star published before I did.
320 Prior to my book, I never read a speculation as to why Cox, Jones, Jett, Bainbridge and Ruggles were not punished or why Parker, Forbes and Hanscom were not questioned, or anything about the almost simultaneous dismissal of Stanton and Parker.
321 Nor did anyone point out the existence of the 10th Street police blotter;
Nor give an account of premature reports of Lincoln's death;
Nor specify the time of Booth's shot at 10:13 P.M.
323 I shall try to show that the essential build-up of my books was followed by Millard in his article.
325-347 (Witness reads to illustrate his assertion the document which is now part of the record as Plaintiff's Exhibit #20.)
349 (Plaintiff's Exhibit 21 received without objection.)
(Plaintiff's Exhibit 22 received.)
351 (Plaintiff's Exhibit 23 received.)
352 (Plaintiff's Exhibit 24 received without objection.)
353 (Plaintiff's Exhibit 25 received.)
354 Mr. Gertz: Now I ask the master and the court to take judicial notice and the defendant to admit that the President . . . has issued proclamations pursuant to the Copyright Act . . . extending to subjects of Austria the privilege of securing copyright.

Mr. Martineau: . . . I wouldn't dispute you now.

The Master: OK. . . .

354-5 (The defendant admits acknowledgments to Eisenschiml by Carl Sandburg in his books. Acknowledgments quoted in full.)
355 (Additional requests for admissions.)

361 *Cross Examination of Dr. Riddle (cont'd.)*
by Mr. Martineau.

370 Neither Mr. Gertz nor Dr. Eisenschiml suggested that I verify the 66 items [Quotes] as infringements.
371 I have never been prompted in any way by either.
377 Eisenschiml's two books are highly original works.
I heard Dr. Eisenschiml's reputation discussed at the meetings of the Mississippi Valley Historical So-
378 ciety, for example his books were discussed as highly original by Prof. Avery Craven of the University of
379 Chicago, Prof. Thomas W. Hutchinson of the same, the late Prof. Chas. Sydnor of Duke University, Prof. Frederick Merk at Harvard, Prof. James Randall of Illinois University, Prof. Frederick Dietz of Illinois, and of course by my own colleague.
380 Dr. Eisenschiml's findings were so new and so im-
381 portant, they were positively startling. They were revolutionary.
381 His findings of fact, and the conclusions he drew, as well as the organization of the facts in a book, these were startling and original.
384 History is an art, not a science.
I regarded Eisenschiml's books as generalizations based upon statements of historical facts.
385 If Dr. Eisenschiml states a historical fact and then
386 draws a sound inference from it, it becomes an accretion to the historical fact; if it is unsound, it is an error.
391 (Commencing at this point, Dr. Riddle was cross examined in great detail as to each of the Quotes or parallels, set forth in full in Exhibit C attached to Plaintiff's Exhibit 7. Plaintiff objected to the prolixity of the cross examination. What follows is an index to the cross examination and, in addition, the passages which appellant believes to be of importance to fairly present the issues

on appeal insofar as this cross examination is concerned.)

(Where below a reference is made to a Quote, it is intended to indicate that the witness was cross examined with respect to the particular parallel identified by the given number in Exhibit C attached to plaintiff's Exhibit 7.)

392 Q. Would you read that to his Honor? What does Millard say there?

Mr. Gertz: Jack, we are not going to have that read into the record again, we already have that in the record.

Mr. Martineau: This is cross examination.

Mr. Gertz: I know it, but why should we?

Mr. Martineau: Because I want my cross examination to proceed as cross examination should.

Mr. Gertz: You already have that in as Defendant's Exhibit 3.

Mr. Martineau: Now I want it in the record, present it just this way so that the Judge doesn't have to tear all around the record for it.

Mr. Gertz: That is a long document. I am objecting, it is already in the record, to having it read once again.

Mr. Martineau: This is cross examination.

The Master: In his cross examination he has a perfect right.

Mr. Gertz: To have him read the whole thing into the record again?

Mr. Reuben: You started it with your parallel column. • • •

393 ff. Quote #1.

Mr. Gertz: Jack, do you mind if I make a suggestion, you can take it or leave it. I think we will be better off, even from the viewpoint of the court, if you simply refer to the item number, it will be understood that you are referring to the item number, whatever the langauge is, it is.

Mr. Martineau: Let me suggest to you, you will be better off if I do, but I won't be. I am sure you will,
394 that is why you are making the suggestion.

Mr. Gertz: I don't see the point of repeating what is already in the record.

408 ff. Quote #2.

414 ff. Quote #3.

417 ff. Quote #1 again.

421 ff. Quote #4.

426 ff. Quote #5.

435 (Witness temporarily excused.)

436 Mr. Gertz: Here is what I have, Jack. I thought maybe these would persuade you to admit the citizenship and we don't have to go through a lot of proof. I have these series of passports of Otto Eisenschiml from 1904 to date, issued by the United States of America, in which his citizenship is stated as a citizen of the United States of America, I have his father's citizenship papers, I have birth records in which his father is described as being of America, I have a group of other documents, all of which add up to in any language proof of citizen-
437 ship. If you still want to question it, I have nothing left to do on that point but to bring the documents back.

Mr. Martineau: I am sorry, I have never seen any of those.

Mr. Gertz: Would you want to take a few minutes to look at them? If you feel you want a little more time, I will simply have Dr. Eisenschiml bring the stuff back. But since the citizenship is in issue in this case, I don't know when it may be in issue elsewhere. I don't want to keep these documents, you know, these are original documents going back to 1869.

The Master: Will it take you very long to check them?

Mr. Gertz: I will give them back to Dr. Eisenschiml and have him bring them back the next time.

• • •

441 Mr. Martineau: Any preliminary matters, Elmer?

Mr. Gertz: I suppose before the end of the day I will have Dr. Eisenschiml introduce those different passports and the like. Otherwise you can go ahead now with the cross examination of Dr. Riddle.

Cross Examination of Dr. Riddle (continued)
By Mr. Martineau.

Q. Dr. Riddle, I have been spending the weekend trying to figure out some way to shorten this because
442 your time is valuable and I know his Honor's, Mr. Gertz' and Dr. Eisenschiml's is, too, and this occurred to me. If we leave out of the calculations the thirteen instances which you pointed out or which you said were exact copying or lifting, would it be possible to agree as to each one of the remaining instances, what you term parallelisms—I believe there were left about 72, roughly, whatever the record shows—would it be possible to agree, I say, that there is nothing within the four corners of the remaining 72 instances which would lead you to the belief that Millard copied or lifted his work, his parallel work, from Dr. Eisenschiml rather than Millard taking it from the original sources?

A. No, Mr. Martineau, I could not agree to that.

Q. Okay, I just wanted to know. I thought we could save time. Then would it be possible for you, Doctor, looking always at the remaining 72 instances, and I always exclude, your Honor, the 13 instances of exact copying that Dr. Riddle told about—would it be possible for you, Dr. Riddle, to look at those remaining 72 and pick out the instances which show to you that within the four

corners Millard did copy from Eisenschiml rather than from the original sources?

443 A. I should be glad to try to generalize it in that way, Mr. Martineau.

Q. I mean, if we couldn't cover it in one general question, as I tried to do initially, let's take them one by one then, and show me the instances which by internal evidence. I believe you call it in scholastic circles, do you not?

A. Yes.

Q. Namely, within the four corners, show to you a copying from Eisenschiml rather than from the original sources?

A. And you wish me to select some?

Q. Let's take them up one by one.

A. Yes. Might I preface that—

Q. Before you start, do you see what I am getting at?

Mr. Gertz: Yes.

Mr. Martineau: I am trying to shorten the thing.

The Witness: Might I preface that with a general statement, Mr. Martineau? You can examine it and if it is objectionable that will end it.

As I understand the validity of this method of literary analysis all that I could observe in those 13 longer

444 passages was that they established a literary relationship.

Mr. Martineau: Q. You speak now of the 13?

A. Yes.

Q. The first 13?

A. Yes. You see, so far no question is raised of whether Mr. Millard got them from Dr. Eisenschiml or from sources which might appear. All that I see there is the establishment of a literary relationship. You could put it this way: Millard derived from Eisenschiml, or Millard and Eisenschiml both derived from a common

source. There is a relationship. What is the relationship?

Q. I see. • • •

Q. In other words, so I understand what you are saying, you weren't giving your judgment that Millard actually copied it from Eisenschiml, you were just simply pointing out to his Honor that there was this literary relationship between Millard and Eisenschiml in regard to these 13 instances?

445

A. Yes, with subsidiary points to come subsequently.

Q. Yes.

A. Then to proceed to the others, such as those 66 on this list—

Q. Referring to exhibit what?

A. Defendant's Exhibit 5.

Q. Yes.

A. There you have passages which do not indicate that extensive parallelism, but indicate a relationship. There is where the answer should be obtained to what is the relationship.

Q. In other words, would it be fair to say that as to those which appear on Defendant's Exhibit 5, those parallels, the parallel there appears to you to be more one of fact rather than language?

A. Sometimes, and sometimes language is involved. Now, to come directly to your question, you had asked me for an example—well, I remember with reference to the first of the longer passages, do I still think in view of the fact that there is exact parallelism between Eisenschiml and Crook, do I still think that Mr. Millard derived from Eisenschiml?

446

Q. Rather than from Crook?

A. Yes, and I said I thought that Millard derived from Eisenschiml for this reason: When you look to the question, what is the literary relationship, I find a number

of passages in which Eisenschiml is the only possible source.

Now, if you wish I could, on the basis of Defendant's Exhibit 5, refer to some few of these and put that point before you.

447 ff. Quote #15.

448 ff. Quote #35.

450 ff. Quote #36.

452 ff. Quote #48.

454 ff. • • • Q. So will you tell us why, on the basis of these O'Beirne references, you feel that Millard lifted this from Dr. Eisenschiml's book rather than from original sources? Is it because the original sources were only in Dr. Eisenschiml's hands?

A. Yes.

• • •

455 ff. Quote #16.

(Mr. Gertz again objects to reading the quotes in full into the record.)

458 ff. Quote #51.

469 ff. • • • Now, will you get to the next case, where you feel, Dr. Riddle, that the four corners of Millard's quote indicate to you by internal evidence that he lifted from Eisenschiml rather than from the original source?

A. Yes. I would refer to any of the references involved in which Dr. Eisenschiml cites the records of the Washington Police Department.

• • •

470 ff. Quotes #13, 27, 34 and 34a the John Parker material).

475 ff. Quote #7.

481 ff. Quote #19.

490 ff. A. That concludes the list of this type where Dr. Eisenschiml cited a source. I have a number of refer-

ences to Defendant's Exhibit 5, of passages in which
491 there is coincidence or similarity in which there is no source reference in Eisenschiml.

492 ff. Quote #6.
498 ff. Quote #16.
503 ff. Quote #22.
510 ff. Quote #27.
513 ff. Quote #38.
519 ff. Quote #42.
526 ff. Quote #43.
531 ff. Quote #44.
543 ff. Quote #45.
549 ff. Quote #47.
560 ff. Quote #49. • • •

564 A. Yes. The significance is that this as a particular datum, and by itself a minor datum, is used by Dr. Eisenschiml and was used by him for the first time together with other data from which he drew the conclusion, that Secretary of War Stanton was implicated in the plot. Now, it is highly significant that the use made of this datum by Mr. Millard is predicated upon that conclusion which was an original contribution of Dr. Eisenschiml. That you will never find in Baker.

Q. Let's see if we can state this thing so upper courts can understand it. I am sure I want to understand anyway.

A. Yes, sir.

Q. The historical fact stated by Dr. Eisenschiml is first, that all ignored the facts about how these three confederate soldiers were treated?

A. Yes. • • •

568 Q. Now, if I understand you correctly, Dr. Riddle, and please amend me if I am wrong, you say that

Eisenschiml posed the question, first, were Stanton and the War Department accomplices in the murder of Lincoln?

A. Yes.

Q. Is that right?

A. Yes.

Q. And he was the first one, you say, to pose that question?

A. Yes.

Q. Now, you say, further, that Dr. Eisenschiml answered that question by means of incidents like this one we are talking about?

A. Yes.

Q. About this special treatment for these three confederate soldiers?

A. Yes.

Q. And he answered to the question by suggesting to the public in effect, Stanton and the War Department were accomplices in Lincoln's murder?

A. Yes.

Q. Isn't that true?

A. Yes.

569 Q. Now, isn't that, I suggest to you, sir, the exact opposite of what Millard says?

A. I don't think so.

Q. Because Millard says "Here, again, we face the incomprehensible mystery of the War Department's selective vengeance," doesn't that suggest the exact opposite of what Eisenschiml suggests?

A. I don't think so, but in any event, Mr. Martineau, the total effect of the Millard article in regard to the role of Secretary of War Stanton is itself a parallel of the Eisenschiml books. • • •

571 ff. Quote #54.

584 ff. Quote #58.

595 ff. Quote #59.
598 ff. Quote #61.
601 ff. Quote #60.
610 ff. Quote #64.
623 ff. Quote #65.
631 ff. Quote #53.
647 ff. Quote #8.

653 Q. Would you tell us how you arrived at that conclusion, Doctor?

A. Yes, sir.

Q. By comparison?

A. I arrive at that conclusion because I know how books are written. Books are written in a number of ways. One of them is the scholarly way which is followed by Dr. Eisenschiml in which sources used are always identified, and exact reference is made to them.

Now, an author who, for some reason does not undertake to do that may very easily and conveniently derive his materials from the products of these scholarly books in which case he has the material before him without the necessity of going to public libraries or to source collections and spending a considerable amount of money in making his own independent research, and that is my inference of what Mr. Millard has done based upon this passage, and much more particularly, upon numerous other passages. • • •

658 ff. Quote #9. • • •

663 ff. Q. Ordinarily wouldn't differences indicate a non-parallelism?

A. Yes, sir.

Q. It doesn't do that to your mind in this case?

664 A. Not in this instance. As I understand it, in this case as in other cases I am drawing a conclusion. Of course, I may be mistaken. My conclusion here is that this is a paraphrase.

Q. Well, let's see. Is it a paraphrase of fact or a paraphrase of language?

A. It is a dressing up in terms of the language with characteristic changes.

Q. You mean designed changes?

A. For example, long drawers as a detail of being nearly undressed.

Q. Yes, just a vivid detail.

A. A little speech. No, Mr. Millard says "pretty speech."

Q. Yes.

A. Dr. Eisenschiml says "little speech".

Q. Yes.

A. Those are the things which indicate to me that there is internal evidence of this being a paraphrase.

Q. I see. Well now, as to the statement of historical fact, however, does not Millard differ seriously from Eisenschiml as to the news which Stanton then received?

A. Yes, sir.

665 Q. And he must have gotten that from some other source, must he not?

A. Not necessarily.

Q. You mean you think that Millard just cooked that up out of his own imagination just in order to conceal his piracy?

A. No, sir, I attribute no such wrong motive to him. An author might restate a phrase without a wrong motive, certainly. In this case he is making his report of an incident and this is the form which it takes in his writing. It could have come out of his own mind there, being nothing in the nature of an appropriation or theft. • • •

669 ff. Quote #10.
680 ff. Quote #11.
686 ff. Quote #12.
696 ff. Quote #13. • • •

701 ff. Q. To refresh your recollection, Doctor, would you take a look at pages 272 and 273, volume 4, of Carl Sandburg's book "Abraham Lincoln, the War
702 Years," and see if it isn't true that Sandburg also treats of the same incident that both Dr. Eisenschiml and Millard treat of?

A. Yes, sir, I see it.

Q. He does, doesn't he?

A. Yes, sir.

Q. There is a very close parallelism between Sandburg and Dr. Eisenschiml there, isn't there?

A. Yes, sir.

Q. Would you say in your judgment it is closer than the parallelism between Millard and Eisenschiml?

A. You ask me to make a comparison. I hesitate to make that offhand. I should feel obliged to read Sandburg with some care to answer that question, Mr. Martineau. It appears to me on the face of it— • • •

704 A. As I say, there is a similarity between Sandburg and Eisenschiml and between Sandburg and Millard. I wouldn't say that in the treatment the differences are so slight as to be unimportant. That is the point I refer to.

Q. Would it be possible to prepare a chart, one of these comparison charts, showing the similarity between Sandburg and Eisenschiml and Millard?

A. Oh, yes, sir.

Q. I wonder, would you do that some time, or would that take a long time?

A. It would take a few hours. • • •

710 ff. Quote #14.
714 ff. Quote #18.
721 ff. Quote #20.
726 ff. Quote #21.
729 ff. Quote #23. • • •

734 ff. Mr. Martineau: Will you state that the original archives contain this whether Millard went to them or not?

Mr. Gertz: The archives are a huge collection of material, millions of documents, and somewhere in those millions of documents there is this document.

Mr. Martineau: We can stipulate to that.

Mr. Gertz: That is right.

Mr. Martineau: That it is a matter of public record.

Mr. Gertz: Well, if the archives are part of the public records, yes, they belong to the government.

Mr. Martineau: Yes, they belong to the government, and a citizen could get access to them.

Mr. Gertz: With permission.

Mr. Martineau: Yes.

Will you stipulate further that Dr. Eisenschiml did not get permission from anybody to photostat a part of the archives that was in the book?

Mr. Gertz: No, the reverse is true. He got permis-
735 sion from the War Department.

Mr. Martineau: He did, eh? Fine. We will get into that with Dr. Eisenschiml. • • •

737 The Witness: What you want for me to do is to check that passage in Sandburg and come to a judgment as to whether Millard or Eisenschiml is the
738 more similar to Sandburg?

Mr. Martineau: Well, I don't want to take up too much of your time. You have got to eat your lunch. If you can do it and give us some of your thoughts on it after lunch—

The Witness: Is that what it was?

Mr. Martineau: Yes.

Mr. Eisenschiml: That is pertaining to what?

Mr. Gertz: To Parker, the Parker story.

Mr. Eisenschiml: The whole 12, 13, 14, 15, or just one?

Mr. Gertz: Was it 14, or was it one, or do you want it all?

What was on your list, Don?

The Witness: 13. The question about Sandburg came up in reference to 13.

Mr. Martineau: I guess it was 13 and 14. You can treat them both together.

Mr. Eisenschiml: Which is the long one?

Mr. Reuben: That is 13.

Mr. Martineau: Yes, and 14. • • •

741 ff. Quote #42.

743 ff. Quote #43.

Q. Doctor, during the lunch hour did you make a comparison of language or a paraphrastic comparison between Sandburg's treatment of the John Parker incident and Dr. Eisenschiml?

* • • •

747 But now I call your attention to two points in Eisenschiml with special reference to the analysis so far. In the references to the use of bad language Sandburg has "profane and insolent". • • •

A. Millard: "For using profane, coarse and insolent language to the owner of a grocery store";

Eisenschiml: "The use of violent, coarse and insolent language".

Q. Yes.

A. Then in this connection, following the reference to being asleep on a street car, there is in Eisenschiml
748 and Millard a reference to the squawking of ducks. There is no reference to squawking of ducks in Sandburg. • • •

749 A. My conclusion with reference to quote 13 is that Millard's language is close to that of Sandburg, but that Millard's account contains material found in Eisenschiml but not found in Sandburg, so that I con-

clude that although there is close parallelism of langauge between Sandburg and Millard, the greater similarity is between Millard and Eisenschiml. • • •

Q. In other words, you say that Millard is closer to Eisenschiml than he is to Sandburg?

750 A. Yes, sir.

Q. In language?

A. Yes, sir. • • •

752 ff. Quote #14.

• • •

758 There you have an example of an item which is in Eisenschiml and Millard, but not in Sandburg.

Q. Yes.

A. Therefore I conclude with reference to quote 14 that the derivation is Millard from Eisenschiml, not Millard from Sandburg. • • •

760 Q. I see. I was going to ask you that question a little later, but we might as well cover that now. In other words, there isn't any discrepancy between what you first called your 85 and the 66 and Defendant's Exhibit 5?

Mr. Gertz: Except that he arrived at it separately and had a different numbering system.

Mr. Martineau: That is right.

Mr. Gertz: So by his numbering system it added up to 85. • • •

762 ff. Quote #24. • • •

766 Mr. Gertz: He also said this, and maybe we can agree to it: that he never looked at the blotter or anything else at the Metropolitan Police Force.

Mr. Martineau: That is right.

Mr. Gertz: And that a source for the comparison
767 between Fletcher's testimony as reported in the printed record and his real testimony was from the facsimiles in Eisenschiml's book.

Mr. Martineau: That is right, it will all come out when you read Millard's testimony.

• • •

767 ff. Quote #29.
777 ff. Quote #30.
781 ff. Quote #31.
797 ff. (Various stipulations with respect to "The Great American Myth" by George S. Bryan.)
800 ff. Quote #32.
806 ff. Quote #33.
817 ff. Quote #34.
824 ff. The 13 identities again. • • •

825 Mr. Gertz: Now, I have here certain passports which I would like to avoid having to deface by marking them. I would like to describe them and perhaps we can agree that that is what the original passports are.

Mr. Martineau: If you say so. • • •

826 Mr. Martineau: Might I point out, your Honor, that in view of Mr. Gertz' reading of the copyright treaty relative to Austrian subjects and having the right to copyright in the United States, that we regard all of this passport business as entirely immaterial, because even though Dr. Eisenschiml is an Austrian subject—

Mr. Gertz: He isn't, he is an American.

Mr. Martineau: I mean, whether he is or he isn't, he is still entitled to a copyright if he has a copyright.

Mr. Gertz: Maybe we could stipulate to something. I would like to state this for the record, and if you agree, then there is no point in a lot of evidence.

It is our theory as plaintiff that either as an Amer-
827 ican citizen or as a domiciled permanent resident alien or as a subject of Austria, on any one of those three theories, Dr. Eisenschiml was entitled to a copyright

for the two books, Plaintiff's Exhibits 1 and 2. We contend that he is an American citizen by birth, but irrespective of whether he is an American citizen by birth or not, we state that for the purpose of this case it is immaterial, because on any one of those three theories he was equally entitled to a copyright.

If you would concede that I won't have to offer all that evidence. • • •

Mr. Martineau: • • • Now, as to category 2 and 3, I would certainly agree with you, but I don't see why we have to bring category 1 into the deal at all. • • •

Mr. Gertz: Yes, and would you also admit that he has been permanently domiciled in the United States since 1902?

Mr. Martineau: As to that, I do not know. It is entirely immaterial now, because if I admit or stipulate that he is entitled to all the rights of an American citizen—

Mr. Gertz: So far as copyright.

Mr. Martineau: —in respect to copyright—

Mr. Gertz: Then we don't need it.

The Master: You have stipulated to that. That is behind us.

829 Mr. Gertz: That is the end of it, that is right. I want the record simply to state that we contend without having to prove that he is an American citizen from birth.

The Master: You have got that in the record now. • • •

The Master: He is entitled to a copyright.

Mr. Martineau: There is no question about that.

Mr. Gertz: The reason I went through this at great length was because they disputed the citizenship. I don't have to prove it.

Mr. Reuben: We never thought it was germane. • • •

Mr. Gertz: Okay, but I wouldn't want the implication

in the record that Dr. Eisenschiml from birth isn't
830 an American citizen.

The Master: Now you have got that stipulation.

• • •

832 ff. The 13 identities again.
833 ff. The first 5 identities.
839 ff. The Crook identity.
842 ff. Identity #3.
843 ff. Identity #4.
The Eckert episode.
849 ff. Identity #5.
851 ff. Identity #6.
856 ff. Identity #7.
858 ff. Identity #8 (?), Quote #33.
870 ff. Identity #9 (?), Quote #35.
878 ff. Identity #10, Quotes, #37 and #53.
879 ff. Identity #11, Quote #39.
880 ff. Identity #12, Quote #39.
888 ff. Identity #13, Quote #56.
893 ff. Dr. Riddle's "Probability Theory."

• • •

894 • • • when I analyze the article and find close similarity of these statements of historical fact and the close similarity of conclusions drawn from these facts and the generalizations which Dr. Eisenschiml made, then I take it that that establishes a degree of probability that, since what Mr. Millard wanted as a writer was readily before him in the books, that it is highly improbable that he spent much time, made much effort or spent much money getting at those other sources. • • •

895 I also perceive that Mr. Millard read and used other books than Dr. Eisenschiml's. Of course he did. Anyone would. It is perfectly proper that he should do so.

Q. And likely and probable that he did do so?

A. Yes, and proper that he should do so, but as far as this analysis is concerned, that is extraneous, when I find that use of materials, which materials are uniquely the product of Dr. Eisenschiml. That indicates that high degree of probability, and still I speak purely with reference to the method of analysis that I have followed, which indicates, I believe, a high degree of probability that he used the Eisenschiml books and that in these instances he did not use others.

• • •

896 Q. Well, tell me this. Would a conscientious scholar or writer, assuming that he read Dr. Eisenschiml's books initially, as you did, and became struck with the theory, would it be conceivable that a con-
897 scientious writer or researcher would, guided by Dr. Eisenschiml, read the original sources and check up on them? Do you think that is probable?

A. Well, Mr. Martineau, we encounter this factor of "How much could this writer afford to do?" • • •
898 Now, to take an example from Millard's article, he makes a reference to the ultimate source, the Albert Galatan Riddle papers. Now, I ask myself, "Is it likely that Mr. Millard would have made the trip to Cleveland?" I don't know where Mr. Millard lives. Is it likely that Mr. Millard made the trip to Cleveland to consult those sources? Unless he was close to Cleveland, it would have been a difficult matter, taken time and cost money. Could he afford to do it?

You see, those are factors in the probability. • • •
901 ff. The difference between Millard and Eisenschiml.
902 There were no differences in the parallel passages.
907 ff. The revisionist historians and Eisenschiml.
908 ff. There has been great discusion of Eisenschiml's theory of the assassination in learned circles.
909 By Professor Paul Buck, "Pulitzer Prize Historian".

Mr. Gertz: By Angle in his book "A Shelf of Lincoln Books." • • •

In the Journal of the Mississippi Valley Historical Association, the American Historical Society, the Illinois Historical Society and others.

910 I don't think there were two schools of thought. What you have is the traditional understanding of the assassination and the revisionist, which is associated with Eisenschiml. The traditional school holds that Booth was a crackpot and had no aid from higher-ups in the government, whereas Eisenschiml suggest the contrary.

911 Bryan belongs to the traditional school. His book has been provoked, at least in part, by Eisenschiml's new evidence.

912 I can't think of any others. The recent book on Stanton by Pratt follows more the traditional view.

You ask me to add up from memory the books 913 the original sources that Eisenschiml researched. I would name them, but of course I could not exhaust the list

The O'Beirne papers.

The time table of the Camden and Amboy Railroad.

The official record of the Conspiracy trial.

The Surratt trial.

The Johnson impeachment proceedings.

These are representative original primary source materials.

Aside from these and the Police blotter, which Eisenschiml dug up, the other sources which he researched are all available to the public.

914 I should like to add the thorough scrutiny of contemporary newspapers. They would be available but must be numbered among the primary sources.

915 After Eisenschiml points the way and cites these newspapers, any other scholar can examine these

sources. This does not apply to the O'Beirne papers of the Camden Amboy time table, nor any longer to the records of the Metropolitan Police, which are no longer in existence.

916 I learned that from Eisenschiml.

Then, of course, there are the secondary materials.

917 You ask me to list the new and original findings of Eisenschiml.

I associate all of them together with the generalized point of the establishment of a high degree of probability that Stanton was involved in the conspiracy plot,

918 that he was the key figure. That had never been pointed out before. This can be broken down into numerous points.

What struck me most strongly was when I first read of the interruption of the telegraph service. Only Stanton could have done it.

919 The naked fact of the interruption had been known, but Eisenschiml put a new interpretation on it.

Then it was readily understandable how the confusion in setting out for the pursuit of the assassins could tie to Stanton. That was the new and great and striking finding.

920 I should like to bring in Eisenschiml's use of secondary sources as well, for in these again many isolated facts appeared, but the strange thing is that previous to Eisenschiml, no one had observed their significance by bringing them together.

921 No standard book on the assassination had cast suspicion on Stanton. Lloyd Lewis mentioned higher-ups, but did not name Stanton. He named Johnson, who was no puppet of Stanton.

922 I may be mistaken, but I think Eisenschiml was the

923 first one to call attention to the photograph which was one of Edwin Booth, not of John Wilkes Booth.

Eisenschiml: The archives were sealed up at the time Robert Lincoln was Secretary of War. They disappeared until 1923 (1933), when I discovered them.

925 Dr. Riddle: I have finished my statement concerning the original findings of Eisenschiml, in the sense of hoping that the instances I recited would be sufficient.

To state which facts were found or stated for the first time by Eisenschiml I would have to consult the books and make notes.

926 If the questions were broken down specifically, I think I could answer them one by one.

928 To the question, "Did any author prior to Eisenschiml voice any suspicion that Stanton and the Radicals stood to profit by Lincoln's death?" I an-
929 swered "No."

For all I know as a witness on oath, there may have been some other author, who had voiced this suspicion, but my question was answered on the basis of my profession. A scholar reads many books, and may
930 not remember this or that book.

As a scholar, I am sure that it was not there.

(Mr. Martineau reads a paragraph from Lloyd Lewis.) "Through December and January 1864, the Radicals massed their forces to drive Lincoln from his merciful position on reconstruction. To them it was vital that Lincoln be forced to abandon his lenient program before the end of the war should come."

Dr. Riddle: I agree that the Radicals were very much opposed to Lincoln in regard to reconstruction, and had to drive him from his position.

931 Yes, one of the means could have been his assassination.

(Mr. Martineau again reads from Lewis.)

Yes, this is a plain statement of a rather vicious hatred the Radicals had for Lincoln.

And if something happened to him they would
932 be glad, including his death.

I point out, though, that the clear implication of those passages is Radicals in Congress concerned with the congressional reconstruction plan.

933 Stanton was in the Radical group.

(Mr. Martineau reads more from Lewis.)

Dr. Riddle: This is another statement of a bitter
934 enmity between the Radicals and Lincoln.

(Mr. Martineau reads more from Lewis.)

935 Dr. Riddle: I do not understand that this is a hint by Lewis that the Radicals may have been concerned in Lincoln's death, nor that they stood to profit by it.

936 As I understand the whole point of Lewis' view, the references are to political reconstruction. I do not get from that the thought, however faint, that they were concerned with his death.

I agree that they were not unhappy that he was gone, but do not go along with you that they stood to profit by his death.

937 ff. Quote #9 again.

Mr. Gertz asked me, "Prior to the publication of the Eisenschiml books, did any author state what Stanton and Eckert did on the night of the assassination, and what their excuses were or that the excuses were untrue?" and my answer was "No."

938 There you have one of those illustrative points. Various of these facts are in the documents, but Eisenschiml was the first to bring them together and show their significance.

939 Some one author will give one fact, of what, say Eckert did; but no one tells you what they did that

evening until they are all brought together.

942 I am contending that [a particular datum] had appeared in Bates years ago. There is a statement of one fact of what Eckert did, but Eisenschiml's Chapter 5 takes that plus others, (also undoubtedly in previous works), but any one will not tell you, save for the specific data, what they did. So I think it is correct to say that prior to Eisenschiml no author stated what Stanton and Eckert did on the night of the assassination.

945 Mr. Gertz' next question concerned the excuses of Stanton and Eckert. Bates tells what excuses they gave to Lincoln but the point is what excuse,
946 the excuse which they gave or the real explanation of their behavior.

948 My answer to Mr. Gertz was not incorrect I was
949 implying the whole Eisenschiml theory.

954 (Mr. Martineau reads the Storey article from Atlantic monthly).

Dr. Riddle: That is a fair statement of some of the things Stanton did on the night of the assassination.

955 Mr. Gertz: Millard changed Mrs. Stanton into a servant.

956 Mr. Martineau: If it is, I certainly would be the last to deny it.

Dr. Riddle: Others authors stated these specific facts in practically the same language, excepting the inference Eisenschiml draws from them.

957 Martineau: I suppose your point is that Bates just states the fact, and does not point up—draw it all together, whereas Eisenschiml does.

Dr. Riddle: Yes, but that is a beautiful illustration of my point of the negative. What Bates story does not even say but implies that Eckert was home.

958 Eisenschiml makes the important point that although he was supposed to be at the War Department, he was not.

Mr. Martineau: Well, this is it, then prior authors could say A) Stanton and Eckert told Lincoln that they were going to be busy that night;

B) without any connective issue, Eckert was home when he was notfied.

Now these prior authors did not say, "Lock at this contradiction. They must have lied," Eisenschiml comes along and calls attention to the contradiction.

Dr. Riddle: I think you just put it very well.

958 ff. Quote #16 again.

968 ff. Quote #22 again. • • •

973 Mr. Gertz: Jack, I am perfectly willing that you develop whatever you want to, but aren't you going a bit far afield?

Mr. Martineau: No. No, because I think it is important. He has told about these things, and I do believe that in your affidavit you mention them as important parts of the doctor's theory, you see.

Mr. Gertz: Surely, but we don't have to prove here whether or not Dr. Eisenschiml is right or wrong. All we have to prove is infringement.

Mr. Martineau: I am not suggesting that you do have to prove that he is right or wrong, or that I have to either, but I do suggest that we have to see wherein these facts fit into the doctor's theory. • • •

984 ff. Quote #10 again.

988 ff. Quote #5 again.

990 ff. Quotes 4, 5, 6, 7, and 8 again.

992 ff. Quote #5 again.

1001 ff. Quote #35 again.

1009 ff. Quotes #13 and #14 again. • • •

1017 Mr. Gertz: I want to make this clear. I have been very patient. I had a man on the stand for half a day. He has been cross examined for six days.

Mr. Martineau: Because of tactics like this.

Mr. Gertz: On every kind of thing under the sun.

1018 I have been as patient as I can be, but there are limits as to how much a man can be cross examined. Now, I want to every now and then, at least, call a halt to this just endless chewing over these things, and where a man tries to create an impression on cross examination about books or anything else, I am entitled to try to cut the thing short, to make it briefer. I think it is just unconscionable that a man should have been on the stand so long in cross examination as it is.

Mr. Martineau: The only unconscionable part was the questions that were asked.

Mr. Gertz: I have a right to try to cut it down.

Mr. Martineau: That is the unconscionable part, the questions that were asked him.

Mr. Gertz: Nonsense. You could have cut this cross examination to two days at most, and you have been at it six days. • • •

1057 Mr. Gertz: I would like to state just briefly without argumentation for the record again, my objection to the unreasonable length to which this cross examination has gone, that has transcended all limits of agreeableness.

The Master: Let the record so show. Proceed.

Mr. Martineau: Maybe this will have a salutary effect on Elmer putting any more expert testimony on the stand, and this is no reflection on you, Doctor, but my understanding of the law is that expert testimony is not admissible in a case of this sort.

Mr. Gertz: That is not the law at all, and if you don't know, you don't. • • •

1082 Mr. Gertz: So you finish your examination. I have already expressed the opinion that I think it is too prolonged and I am not going to give you the opportunity to make it even more prolonged.

Mr. Martineau: Then in that case I would apply to the Court for relief.

Mr. Gertz: You could call him back as your witness, then, because when he is dismissed I want him to be dismissed. • • •

1083 Mr. Martineau: I just want to make sure that we have covered all the items.

Mr. Gertz: Yes, but I am for the record expressing an unwillingness to have the cross examination hang in mid-air. I believe that he should finish his cross examination and not say, well, at some future date I am going to finish it. It is like in any other trial when you have a witness before you, you finish.

Mr. Martineau: If we are going to start playing according to the rules, then I think we will have to make things go on both sides.

Mr. Gertz: I have already said that I think you have gone far beyond the limits and I am not going to give you an opportunity to go even farther. • • •

1091 (End of cross examination of Dr. Riddle.)

1093 ff. (Mr. Gertz attempts to introduce portions of Millard's deposition as if the testimony of an adverse witness. Mr. Martineau objects and then withdraws his objection. Portions of Millard's deposition read into the record directly or by page references.)

1130 *Direct Examination of Otto Eisenschiml (Continued) by Mr. Gertz.*

The markings and underscorings in Plaintiff's Exhibit #1 were made by me, and extra copies were made by people in my office.

1132 The markings and numbers in Plaintiff's Exhibits #1 and #2 refer to the Millard article (Plf. Ex. 3).

1134 The numbers in the margin correspond to the 66 Quotes.

1138 I wish to correct or change, or explain and clarify some things I said in my affidavit.

1139 I would like to correct paragraph 10 on p. 2 to
1140 read: "The work affiant did on 'Why Was Lincoln Murdered' involved about 18 years, and, together with 'In the Shadow of Lincoln's Death', the expenditure of [about $20,000".]

On p. 3, line 3, I will read line 2 first "A special secretary worked for him for about 3 years." I want to change that to "several years".

1141 In Paragraph 10 I want to omit the last 2 lines beginning with "The cash expenses for 'In the Shadow of Lincoln's Death' amounted to about $3,000 in addition to his own time", because I have already included this expense in my first change.

Page 4, paragraph 13. Change "book reviews" to "books, reviews".

1142 Page 6, point (d): "The reports of Lincoln's death had been published." I want to change "published" to "reported".

Point k, n, p, r, on page 6 and x, on next page
1143 should be introduced with the words "the significance of".

(k) will now read "The significance of Stanton's false" etc.

(n) will read, "The significance of the contradictory" etc.

(p) will read "The significance of the statement" etc.

(r) will read "The significance of the fantastic clues" etc.

(x) Page 7, "The significance of Stanton's delay" etc.

1144 (dd) Page 7, "The reason for the premature arrest" etc.

(ff) I would like to withdraw.

Par. 20 (b) I want to add after the last words, "Washington quarters", "and that it pointed to Stanton".

Page 11, par. 26. I want to insert the word "about" in front of "25%".

That is all.

• • •

The last time I was able to buy the February 1953 issue of True was early in November of that year.

At and immediately prior to the publication of the February 1953 issue of True I was engaged in an effort
1145 to republish "Why Was Lincoln Murdered." I engaged an agent, Ralph Newman, owner of the Abraham Lincoln Bookshop.

1149 The Master: And what did you direct him to do to secure republication of your books?

Eisenschiml: I directed him to tie up . . .

The Master: I think this is as far as you can go. . .

1151 Mr. Gertz: Have you arranged for the republication.

Eisenschiml: No, not successfully.

Mr. Martineau: I object to successfully.

The Master: The "not successfully" may go out.

1152 The "No" may stand.

1153 Mr. Gertz: Did you have anything whatsoever to do with a letter written by Charles E. Mason to Fawcett Publication, Inc., under date of February 19, 1953?

1154 Eisenschiml: Nothing whatever. . . . I did not know before he wrote that letter that he was going to write it.

Millard visited me once, and looked over my books. I would not call it research. He spent about one and one-half hours. It was about 1946, I imagine. It was prior to

the publication of his story, "The Devil's Errand Boy."

I never talked to him after that, with the exception of when I met him in New York, connected with his deposition.

1156 ff. Quote I.

1163 I suggest that I may take #I in my own fashion.

1164 The internal evidence here is that these changes aroused the suspicion that they were made for a purpose. If the purpose is not apparent, the changes were made to cover the source.

"The little village" against "the town" is apparently without any value.

The "40 miles" against the "80 miles" is important. My suspicion is strengthened by the fact that by leaving out the 80 miles, the author weakened his point. The farther away this little town was from the nearest telegraph and railroad, the stronger the improbability that news could have reached it.

There is further evidence. In Chiniqui's book a whole chapter is given over to the assassination, from page 718 to page 735, part of it is source material for the excerpt Chiniqui himself quotes. Yet Millard has not mentioned the book in any other fashion.

1165 Mr. Martineau: I move to strike the entire answer.

The Master: I don't think there is any question about that, but we will adjourn till tomorrow.

1170 ff. Quote #3.

Mr. Martineau: It is understood that I object to this line of questioning.

The Master: Let the record so show.

Eisenschiml: Millard states that "At 2:30 P.M. of April 14 the Whig Press of Middletown, New York, pub-

lished the news." As a matter of fact, it published the news on the 19th.

1171 I got my information from the archives in Washington, of the Provost Marshal's office. I made a note at that time. I have it with me.

(The note is marked Plaintiff's Exhibit #27A).

1172 The notes were probably typed by Virginia Maier. They were typed immediately and checked against my pencilled notes.

1173 I never showed this note to Millard. I suppose the pencilled note was thrown away after being checked.

1174 ff. Quote #9.

This Quote was taken from the Atlantic Monthly of April 1930, page 464.

1175 ff. (Reads part of the article into record)

1176 I made myself thoroughly acquainted with the record department of the Police Department in Wash-
1177 ington. I examined them in or about 1933.

1178 My visit was not a continuous one, and was spread more or less over the year. There were several visits, totally I would say five or six days.

The records were in a haphazard condition, and located in two different places.

1179 The ledgers, as they called them, were in the garret, piled half way up to the ceiling without any order whatever. There was another department which had files that were completely haywire. That was when I first looked at them.

I examined the records from 1861 to 1865, whatever I could find.

1180 ff. Quotes 13, 14.

The material for #13 and #14 was scattered all over. The arrangement is my own and not identical with the arrangement of any document of the Police Department.

The material for #13 and 14# was not found in one document, I don't know in how many.

1181 I know of nothing in print on the Quotes 13 and 14 prior to the publication of Why; nothing containing the information set forth in these Quotes.

1181-82 I do not think there was anything of it in print containing all the material in Quotes 13 and 14, since the publication of Why and the publication of the Millard article.

During my visits to the Police Department I examined the police blotter, and made a photostat of it. I made notes of the records. Other than the police blotter, I do not think any records with respect to Parker are now in existence.

1183 ff. Quote 17.

I find internal evidence in Quote 17, that it was copied from me by Millard.

(Reading from the True article, page 109, column I, center: "And there is something terrible sour about the picture of a Washington newspaper man concealing the news beat of the century.")

This follows what is quoted in #17 in Exhibit C. I am now quoting from Exhibit I, page 29, after the top, paragraph 1, line 3: "If Hanscom was any kind of a newspaper man, why did he not . . . secure for his paper the great scoop of the century?"

1185 ff. Quote 21.

I found partial internal evidence that Millard copied from me.

1186 I am turning to page 175 of "The Great American
1187 Myth", after top, paragraph 2, it reads, "Coachman Burke." There was no such coachman that I ever heard of.

Mr. Gertz: In the index page 413, there appears, "Burke, Francis, Lincoln's coachman etc."

Mr. Martineau: Subject to verification, I will take your word for it.

1188 The name of the coachman was Francis Burns.

1189 ff. Quote 26.

I find internal evidence of copying here.

(Reads from "Magazine of History", February 1911, an article by Gleason

1190 but is asked to read it again without skip marks.)

1191 "It took a long time to reach General Augur's and when we arrived we found everybody excited, and confusion reigned. If there was any cool-headed man there he was not in sight—nor is it to be wondered at, the shock was so great the mind was dazed and numb.

"I went at once into a small room where several officers were holding some sort of a conference, told them all I knew about the persons suspected, and advised the arrest of Wiechmann and everyone found at the Surratt house, which should be searched at once. I also asked for a cavalry squad to go with me to the Surratt place in Maryland, as I thought the assassin would escape that way.

"But they thought I could be of more assistance in Washington than in pursuit of Booth, who by that time was known to be the assassin. Sometimes toward morning I was allowed to go back to my room."

1192 ff. Quote 29.

I found internal evidence of copying here. I shall read from L. A. Gobright, "Recollection of Men and Things During a Third of a Century", 1896, page 348.

1193 (Reads)

1194 ff. Quote 36.

1195 Eisenschiml: I found internal evidence of copying here. I am referring only to the last two lines of Quote 36. "To remain on the Maryland side of the Potomac," is my version.

"A flat order from Stanton to remain on the Maryland side," is Millard's.

1196 Mr. Gertz reads the entire sentence, beginning with "One can imagine his surprise" and ending with "on the Maryland side of the Potomac."

1197 And from Millard: "Back came a prompt and to O'Beirne, bewildering reward for his zeal . . . a flat order from Stanton to remain on the Maryland side, and under no circumstances, push his pursuit into Virginia."

(It is stipulated that the matter of damages will be
1198 reserved until the Court has adjudicated the issue of infringement.)

1198 ff. Quote 36. Internal evidence of copying.

1201 ff. Quote 39.

I find internal evidence of copying here.

Mr. Gertz: Is it your contention that it is improper to ask Eisenschiml to state his reasons in connection with each of the quotes that there was copying?

Mr. Martineau: I think that is argument.

1202 Martineau: If it is helpful to the Court, it should go in subject to objection.

1202 ff. Eisenschiml reads from "The Annual Report of the American Historical Association, 1930, Vol. 4, The Diary of Edward Bates." • • •

1206 Mr. Gertz: I am not going to read, I am just going to indicate so it is in the record, the last 12 lines on p. 100 of Millard's direct examination and the first 11 lines on p. 101.

1206 ff. Quote 40.

Eisenschiml: I find internal evidence of copying here. I am going to read from "The Lincoln Herald", Feb. 1946, p. 25.

1207 (Reads)

I will now read again from Baker, p. 479.

Mr. Gertz: Offers Millard's deposition p. 501 and part of p. 502.

1208 ff. Quote 47.

Eisenschiml: I find internal evidence of copying here. I shall read from a statement made by Dr. S. A. Mudd (the document is marked Plaintiff's Exhibit 28).

1209 This is a copy of a statement in the files of the Provost Marshall's office in Washington entitled "Statement of Dr. S. A. Mudd." I obtained it there, and it was copied on the spot, in pencil by myself and immediately transcribed and checked. It is now in exactly the same condition it was then.

1210-1211 (Reading part of it):

"His friend urged me to attend to his leg as soon
1212 as possible, as they were very anxious to get to Washington; and then, it is my impression, he inquired if they could not reach some point on the Potomac, where they could get a boat to Washington."

1212 ff. Quote 54.

I see internal evidence of copying here. (Reads from various documents).

1214 There is, other than the 66 Quotes, one sentence which contains material pertaining to this matter.

1215-1219 (Discussion on admitting argumentation by Eisenschiml.)

1219 I am reading from Millard's article, p. 112, vol. I,
1220 almost in the center paragraph, the one beginning with "Meanwhile". "Major OBeirne, the District Provost Marshall, rushed a detective named John Lee over to the Kirkwood House to guard Andrew Johnson. Then Lee, probably stopping for a quick one at the Kirkwood Bar, heard from the bartender, Michael Henry, about the suspicious actions of Atzerodt."

I shall now read from Exhibit 1, p. 66, line 8 from
1221 bottom: "Vice President Johnson who had his living quarters at this hotel, and hence a detective of Major O'Beirne's squad, John Lee, was sent there as a guard, after the assault on Lincoln on the night of April 14. A bartender by the name Michael Henry told the detective of his suspicions regarding the odd looking stranger who had behaved queerly."

Now I am reading from the O'Beirne papers.
1222 The letter is marked "Kirkwood House, July 20, 1865 "and reads: "To O'Beirne: Having on or about the 15th of April given information to the Detectives then on duty guarding Mr. Johnson's room. One suspicious character in room 126 of the Hotel which is being searched, proved to be Atzerodt's, and from the things found in the room. He was caught I would like you to give due consideration and if it is worth anything I hope to receive it. This statement I can prove by two or three detectives now in the service of the government.

Yours most respectfully,
Michael Henry, Bartender"

1223 I shall now read from Pitman, p. 144, John Lee's testimony: "On the night of the 15th of April, I went, by order of Major O'Beirne, to the Kirkwood House. When I got there a person employed in the home, whom I knew, told me there had been a rather suspicious looking man there who had taken a room the day previous."

I shall now read Lee's testimony from Ben Poore.
1224 "I then went out into the barroom; and while I was there, a friend came up to me—I say a friend, because it was a man whom I see about the streets every day. He said there was a rather suspicious looking man there who had taken a room the day previous and that I had better go and look at the book."

I am now reading the version in the Philadelphia
1225 Inquirer, p. 23: "It was the night of the 15th of April. I then went, and while there a friend came to me and said there was a rather suspicious looking man who had taken a room there the day previous and I had better go and look."

I have never seen any source other than the O'Beirne papers where the bartender Michael Henry is mentioned.

1228 (The Henry letter is marked Plaintiff Exhibit #29)

I located the original pencilled note.

1229 (This note is attached to Exhibit 29.)

1233 I shall now make explanatory statements on the specific instances discussed yesterday where there is internal evidence of copying. I begin with Quote 3.

1234 I stated that this particular number of the Whig Press of Middletown, New York, was published on the 19th of April, 1865, but Millard gives the publication date as April 14. My conclusion is that if he really had examined the paper he would have noted that it was the issue of the 19th. The language in the paper was awkward, and in following it. I might have given the impression that April 14 was the day of publication.

In other words, Millard misunderstood my language.

1235 Before I go to the next Quote, I want to point out that I quoted 4 instances of premature rumors of Lincoln's assassination. I believe there must be many more, and it is curious that Millard quoted the same 4, and none else.

The next Quote was #9.

The point I wanted to bring out yesterday, is that Millard in his version introduced a servant. The writer telling a story from a source material may use his literary

license to change phrasings, but he would be disinclined to contradict his source. In the source it was distinctly stated that the servants were absent, which leads me to the conclusion that Millard did not read the original
1236 article.

Quotes #13 and #14.

In the original records of the police department these records are in staccato form, like "John F. Parker, born May 19, 1830 etc. Trade: Carpenter, Residence—" whatever it is.

1237 The narrative [form] in Quotes 13 and 14 is mine, and Millard follows my phrasings almost exactly.

1238 Quote #17.

The expressions "The great scoop of the century" and "the news beat of the century" are unusual ex-
1239 pressions, identical in meaning and very closely allied. I therefore believe that Millard took it from me.

Quote 21.

When I read #21 yesterday, I did it to show that Bryan, the author of "The Great American Myth", who calls Burns Burke, is not dependable. Anyone using Bryan could not have come up with the name Burns (as Millard does).

1240 Quote 26.

1240 ff. Today I would like to read the different versions in a foreshortened fashion, so as to bring my point home better. This is the way the article appeared in the "Magazine of History." (Reads Plaintiff's Exhibit 30).

1242 Quote #29.

1243 I am abbreviating again. (Reads Plaintiff's Exhibit 31).

1245 ff. Quote 36.

I read everything pertinent today, and my conclusion rests on the ending of the sentence which, in all the books quoted, said that "he was refused."

1246 Only in my language he was "ordered to remain on the Maryland side" [of the Potomac].

1246 ff. Quote 39.

I quoted various passages from Bates that might have been quoted with equal pertinency. I myself was in doubt which one to quote.

Millard accepted mine.

I read Orville Browning and showed that the sentence or paragraph in which the quotation occurred is longer than indicated in this quotation, and might very well have been quoted in toto, or in larger proportions.

1247 When the entry was made, Browning was not Secretary of the Interior. I would describe him as an ex-Senator from Illinois. At that time he had no official position. And in the original work he is named Orville Hickman Browning, and I shortened it. Millard did the same.

1247 ff. Quote 40.

I showed that the description of the Surrattesville Tavern was taken from my own, and does not appear in either Baker or the magazine "Lincoln Herald."

In neither is there a description at all like mine.

1248 I may add that in the Lincoln Herald there are some pictures, which do not show the peach orchard, the shed and the barns.

(The Herald article is marked Exhibit #32.)

1249 ff. Quote 47.

In the original statement by Dr. Mudd, which I read yesterday, the expression about going north and south are not contained. On p. 92 of Exhibit 1 is a

1250 map. Unless my readers look at it, they would not

understand the question. You will notice on it the town Bryantown, and Dr. Mudd's home about half way on the dotted line between Mathias Point and Washington.

Booth and Herold arrived at Dr. Mudd's house,
1251 pretending that they were riding to Washington, not from Washington, so as to avert suspicion. In reality they were trying to go South, and had to fool Dr. Mudd, so as to get his road information without giving their game away. If you look at the map, you will see that the closest place at which the Potomac reaches Bryantown is south of that town. Now you will understand what I meant by saying "The fugitives were in a hurry to reach the Potomac going south. Herold claimed that they might find a boat to take them back north, to the
1252 Capital."

The point I want to make in regard to Millard's version is that in his saying "Herold admitted". In this case the differences between these words is striking.
1253 By using the source I used, he could not have used the language he did; and only by using my Quote 47 could he have come up with his Quote 47.

1254 Quote 54.

In 1937, in Why, I said, "In all likelihood a promise of clemency was held out to Mrs. Surratt."

In 1940 when I wrote Exhibit #2, my surmise had been proved by testimony of Colonel Wood in the Washington Gazette, which I did not know when I wrote Exhibit #1.

1255 Quote #64.

In order to arrive at the opinion that Booth fired his shot close to 10:13 P.M.

I made some tests, part of which I laid down in Exhibit #2, p. 353, line 10.

1256 (Reads from Exhibit #2).

My tests were these. The custodian of Ford's Theater indicated to me where the dressing rooms of the artists must have been.

1257 I then placed myself in front of the theater entrance, on the spot from where that man was supposed to have rushed to his dressing room. Then I took his statement that he was not there more than two minutes, and the time came out 13 minutes past 10.

I said "close to" because there are some intangibles in the calculation.

I have never seen any source, whether in print or in a document, aside from my book and Millard's article, in which the time of 10:13 appears.

1258 This is my photographic album, marked "Taken in April 1933", and entitled "Pictures of Points Touched by Booth during His Flight from Washington, April 1865."

I took all these pictures in 1933, except a couple which are marked "bought".

1260 (The album is marked Plaintiff's Exhibit #4.)

The pictures are not in chronological order. The first is "Good Hope Hill", the next the Surratt Tavern, then the village T.B., the hotel in Bryantown, Dr. Mudd's house, Cox's farm, and Garrett's farm.

Cross-Examination of Dr. Eisenschiml by Mr. Martineau.

1263 I am also a chemist. I have an honorary degree of doctor of literature from Lincoln Memorial University.

1264 I graduated in 1901 from the Polytechnical School
1265 of Vienna, Austria. I was first employed by the Car-

negie Steel Company in Pittsburgh, was employed as a chemist till 1912.

1266 Then established a chemical company of my own, The Scientific Oil Compounding Company. I am now chairman of the Board, a position I have held three or four years. Previously I had been president. I de-

1267 voted all my time to it up to 1918.

1268 I devoted then more time to other matters. I had been interested in the subject of Lincoln's assassination and the Civil War period long before then, but haphazardly.

1269 It is hard to approximate the time I spent on this subject from 1918 on.

1270 I also lectured on history and chemistry.

1271 At the end of 1932 I began to employ research

1272 assistants, Mrs. Goldberg, Sally Owens, Sally Holmes and others such as Helen Lemberger; a man by the name of Oliver Orr in Macon, Georgia, one Janet Stine in Philadelphia; one Charles Tyngg in Washington; a girl named Heath in Burlington, Vermont, one named Ellert in Crawfordsville, Indiana.

1273 From 1935 on the number increased. I paid them all, of course. The rate varied. Some were permanently employed.

1274 In form of a book by a reputable writer, I was the first to indicate, not say, that Stanton was a partner in the murder of Lincoln.

I did not prove that Stanton was guilty. I distinctly so said.

1275 On page 438 of Exhibit I, I stated my position: "A great deal of new evidence must be brought to light before students can write a definite answer to many questions, etc."

One of my purposes was to stimulate research on that

subject, also thought and discussion, and a re-examination of that point in history.

There is a degree of probability that Stanton was guilty.

1276 I did not want the readers to believe that the evidence pointed to his guilt. I had no such intention. I put forth the facts as I found them.

1277 I do not express an opinion of my own.

1278 I was inviting public discussion and new facts. I am even presenting material that counts against the 1279 theory of Stanton's complicity. I remember the phrase that an indictment against him would not stand up.

1281 My belief since I wrote the book has not been changed, but has been strengthened, but my belief is quite unimportant. It is not a question what I believe, but what are the facts.

1283 Personally, I have not made up my mind. I am waiting for new facts.

1285 I would also welcome intelligent inferences from old or new facts.

I wrote two articles for Coronet Magazine, which dealt with Lincoln.

1286 One was called, "Could Lincoln Have Been Saved?" The other was called something like, "Lincoln's Seance." The first appeared in book form in a book called "The Case of A.L. Aged 56."

1287 It was very early in the twenties when I first conceived the notion that the conventional theory of Lincoln's assassination was not valid.

I was investigating the Battle of Shiloh, in which my father fought as a captain of the 13th Illinois infantry. From there I got to Grant, and the question arose in 1288 my mind why he didn't go to the theatre that night. Each question opened another one.

1291 I do claim that I was the first to discover that Mrs. Lincoln was responsible for Parker's appointment.

I would not express a legal opinion on what constitutes literary property.

1292 By a stretch of the imagination, I was the first to indicate that Mrs. Lincoln could be said to be under suspicion.

1293 The "stretch of the imagination" is plainly sarcastically meant. The sarcasm is directed at Millard. I do not express that suspicion. My intention was to throw it into ridicule.

1294 I do claim that the John Parker story is a very important and integral part of the thesis of my books, negatively speaking more than positively, because 1295 his absence was so carefully hidden in later endeavors. The negative evidence is the extreme carelessness with which Lincoln was guarded. I established the history of Parker and how he got into the act.

1296 I am less emphatic on how this points to Stanton; more on why he remained on the force until the moment when Stanton resigned.

I would not say that Stanton was responsible for Parker's appointment. Again negatively speaking, 1297 if any one but Parker had been on duty, Booth would have met with difficulties. Connect it also with the fact that Lincoln asked for a specific bodyguard and did not get it.

I do not think Mrs. Lincoln's being responsible for Parker's appointment is a necessary part of any thesis.

1298 Nor do I suggest that Major O'Beirne was in complicity with Mrs. Lincoln, Parker or Stanton.

1299 Millard accuses Mrs. Lincoln right in the beginning of the article; perhaps that is putting it too strongly.

1300 Eisenschiml reads from Millard's article last line on page 34,

"Everyone from Mrs. Lincoln to a gin-soaked prostitute on D. Street was at one time or another under suspicion . . ."

Millard did not get that idea from me.

1301 The only possible intimation that Mrs. Lincoln might have been connected with this thing Millard derived from me. It is, I would say, a misconception of the letter in my book about Parker's appointment.

1302 Negatively, Millard got the idea from me.

1304 Millard drew an inference which he could not have drawn without using my property.

19 (d)

1305 "That reports of Lincoln's death had been published in various papers prior to the tragedy."

1306 I found out later that I had made an error, and changed "published" to "reported". It really should be "rumored".

1308 I said there must have been others, or may have been others. This is an assumption on my part.

1309 So far as I have factual background, the only premature reports were those I mentioned.

19 (K)

1311 "Stanton's false oath about Lincoln's not being at the War Department on April 14, 1865."

1313 I prefaced the original statement with "The significance of" to have it mean that I had the reason for it in mind. Or the explanation for it.

1314 The parts of my book where this appears is on page 34. It is also in Quotes 9, 10, 11.

Reads last paragraph on page 34.

"As the conversation regarding Eckert's services could not have taken place on any other day but April 14, after General Grant's positive cancelation of his proposed visit to the theatre, Stanton's sworn

1315 statement to the contrary assumes a peculiar significance."

If Stanton had admitted that Lincoln was at the War Department on April 14, he naturally expected to be asked what happened, and he could not afford to have the conversation with Eckert put on record. There were two witnesses, Eckert himself and Bates.

The best thing for him was to deny that Lincoln
1316 was there. That statement would probably pass unnoticed.

1317 In the book I came as closely to what I intended to imply as I wanted to at that spot. On page 33, paragraph 2 (Reading)

"Stanton did make one reference to Lincoln's last visit to him . . . This is Stanton's best recol-
1318 lection of what took place. Not a word about Lincoln's request for Eckert's services, nor about his obvious disappointment in having been refused so cavalierly."

He was concealing that he had perjured himself.

I am suggesting in the book that he could have had a hard time explaining it.

1319 You might construe it as a suggestion that Stanton was implicated in Lincoln's death. All these facts are cumulative. No one link in the chain, in my belief, is proof of anything. Maybe the whole chain does not prove anything.

This link aroused my suspicion.

I left it to my readers' whether they shared my
1320 suspicion, not yet that Stanton was implicated,
1320 but that he was not particular about Lincoln's protection that night.

This is as far as this incident would lead me.

1321 You ask if Stanton might not have been just negligent. He had been requested by his superior to

let him have a major in Stanton's immediate employ as a bodyguard, and Stanton said no.

I don't remember what explanation Clara Laughlin
1322 has, but you say she contends that Stanton was a domineering sort of fellow, disapproved of Lincoln's exposing himself, and refused his request so that he could not seem to sanction Lincoln's exposing himself. That is a possible and impossible explanation. If the danger was there, there certainly was no reason to withhold the bodyguard.

1323 Millard pirates me in this way on page 106, column 1, nine lines from bottom.

(Reads): "At the War Department on which laid the tremendous responsibility of guarding the life and safety of the President theey labored mightily over tasks of vital importance.

"Or did they?"

I think Millard copied me here.

1325 I have never seen any author suggesting that there was something suspicious about this business. Nobody raised this question, so far as I know.

1326 Millard copied my question, and the
1326 significance and the inference.

1327 I was the first to ask the question and answer it, by proving that Stanton lied.

1331 19 (N)

1332 The original statement was

"The contradictory and evasive statements of Major Rathbone and Miss Harris."

1335 This original statement is not tenable and I don't intend to defend it.

1336 I intended, when I dictated this statement, to have in front of it the words, "The significance of."

1341 May I recall to you that Millard admitted that he had not known the fact of this statement even in its

original, now obsolete form. He had only known of one of Miss Harris's statements, not the other.

1342 Nevertheless, now I only claim piracy in regard to the significance of the fact, the inference from it.

1343 This matter corresponds to Quote 22.

(Reads: "What makes Miss Harris' statement . . . doubly remarkable is that it differs so radically from the sworn statement she made . . . two days later . . . she must have forgotten the man . . . completely . . ."

Millard's statement is on page 110.

(Reads): Later that night Clara Harris gave her sworn statement . . . the statement should have

1344 aroused feverish interest but it didn't for the simple reason that Clara Harris made another statement a couple of days later and left that part completely out."

The first statement Miss Harris made concerned the intrusion of a man into the box, and I believe Major Rathbone's reaction to it.

1345 If she had repeated that statement later, it would have brought to light the fact of Parker's absence or presence in the first place, and the lack of protection. In turn, it might have spread farther up. It might lead to Parker, and we do not wish to discuss Parker. That is my implication.

It is said on page 26:

"Such an investigation unquestionably would have

1346 thrown Parker's action into full relief and might have led to further disclosures of his appointment and to the still more curious fact of his immunity from punishment."

That would have lead directly to Stanton's door.

I did not intend to suggest this to the reader.

1347 I intended to present the fact and let him go on from there.

1348 I have voluminous notes on my research. They are not all facts. It was first to be established whether they are facts, rumors, newspaper stories that are not substantiated

1349 so first they have to be separated.

Then it was my job to arrange the facts into two books. That was my literary creation. But the facts alone do not make the books. It is their arrangements, and the inferences from them, and literary style.

1350 There are many factors.

The books are the result of my research.

The research may lead to facts, to negative facts, to lies, to perjuries, all kinds of things.

One has to exercise judgment as a historian and as a writer.

1351 I was not trying to prove Stanton's part in

1352 the first place. It had to develop from facts, and I let the facts lead me.

My working hypothesis to start with was that the facts about Lincoln's assassination had been very sparsely and incorrectly set forth so far, that a great many facts had not been dug out. I wanted to assemble them, and put them before the public.

1353 Some of the questions raised I answered, and some I did not, because I could not. I absolutely was not catering to sensationalism.

1354 This was a scientifically conceived book.

1356 I hinted very distinctly that Miss Harris changed her testimony, because somebody got her to do it. The somebody was not Stanton, but her fiance who was a major in the army, and susceptible to Stanton's suggestion.

1357 You ask if she could not have made a mistake in the first affidavit or that it was given hysterically. I don't think so.

The first was given on the spur of the moment before anybody could influence her. She would hardly suck such a cloak and dagger story about a man bursting into
1358 the box, and so on out of her thumb.

I would not call it perjury. She only said that her fiance's statement was substantially correct.

1359 It would require a great amount of naivete to to think that she overlooked that part.

1360 It was an evasion.

1361 This is on p. 22 in Why.

1362 I think distinctly that there is a real divergence between Miss Harris' two statements.

1363 I do claim that here is a treatment copying or language imitation on Millard's part. You said, we'll come to that later in Quote 22.

1364 He copied my inference. We have covered that, by saying, "Had she forgotten the incident? . . . Or was she quietly gagged.?"

I do not claim the exclusive right to ask this
1365 question or in anything. I claim that when people take my research, it is a legal question whether they have pirated or not.

Unless they get my permission.

19 (p)

"The statement of the coachman Burns that he had taken Parker and Forbes for a drink."

1366 I have been unable to find that Burns was ever before mentioned in this connection in any work on the assassination. Nevertheless I inserted "the significance of", because that's the burning point.

1367 The name of Burns is commonly known; that's why I said "in this connection". I dug this (19.p) out from the archives.

1368 Having dug out this information, I claim that a man has a property right to his research.

1369 Before using it, others should either get my permission or check up on the original source.

My contribution to history was involuntary and automatic.

1370 I claim [in this instance] a property right to the significance of my inference, but I do not necessarily relinquish my rights on the facts themselves.

1371 Contributing something to the world, is an indirect desire of a scholar to add to the sum of human knowledge, but not necessarily the first. The first is the thrill he gets out of discovering something new, like the man who stood and saw the Pacific Ocean which no white man had ever seen.

1374 I lost money on all of my books.

1375 What caused me to insert the word "the significance of"? One gets stale reading one's own words, and does not notice the inconsistencies.

1376 The first inconsistency I discovered was in 19 (r), "The fantastic clues discovered in Atzerodt's room". That was known to every student of the assassination and I wonder how I could have been so sloppy.

1378 I do not think a charge of pirating would ruin Millard's career, except where copyright infringements are important. It would not hinder him in writing novels and other things.

1379 Millard admitted getting something from my books, but acted in good faith, not knowing that he might have violated a law. If I were a publisher I would not think that his usefulness

1380 had ended. On the contrary it was improved now that he knew what the law was.

1381 Millard never confessed to me that he was wrong,

1383 although I had a very friendly conversation with him. I thought he was a very capable writer.

He started the conversation by saying that he had mentioned me honorably in the original manuscript and that that portion had been taken out.

1384 I thought he was in the clear, morally, but not legally 19 (q) (Quote 64)

"The exact time when Booth fired his shots." • • •

1385 Q. In other words, you claim the exclusive right to say in substance: "John Wilkes Booth shot Abraham Lincoln at 10:13 p.m. on April 14, 1865."

A. Yes.

Q. Right?

A. I do unless somebody wants to go through a similar experience and check up on it.

Q. Or unless that someone says, "By courtesy of Otto Eisenschiml"?

A. That is right. With my permission. That is right.

Q. Well, you, of course, intended to state that as a fact of history, did you not?

A. Yes.

Q. The fact that Booth shot him at 10:13?

A. Yes.

Q. Well, do we understand, then, Doctor, that as a scholar you want everybody else to go through this agonizing research you did in order to be able to say that Booth shot him at 10:13?

A. No, I do not. I want them to take the other alternative.

Q. You mean to say "By courtesy of Otto Eisenschiml"?

A. That is right, yes.

Q. Well, do you want him to come and get your
1386 permission in advance, do you want him to come and say, "Dr. Eisenschiml, please, may I say that Booth shot Lincoln at 10:13"?

A. That is mostly the way it is done, although there are times when you get the permission afterwards and take the chance of having to delete part of your work.

Q. In other words, had that been done in regard to this one fact you would have no complaint about this fact?

A. Oh, that one fact is a curiosa.

Q. Or if they had said in this piece that you are complaining about, "Booth shot Lincoln at 10:13 p.m. on April 14, 1865; footnote by courtesy of Otto Eisenschiml," that would be all right, wouldn't it?

A. I would have probably given — as a sole fact by itself and no other quotation, I most likely would have said yes. * * *

1389 19 (r)

"The significance of the fantastic clues left in Atzerodt's room."

1391 I would not accuse Millard of piracy in stating the clues. He did not need my permission for that.

1393 The essence of the significance is that Booth, in his contempt for the intelligence

1394 of the police, perhaps in a spirit of bravado left clues behind that could not even be misunderstood by any half-witted detective.

1395 These clues have been cited repeatedly and no one has ever noticed the peculiar nature of these clues or given them any interpertation at all. They just stated the bare facts.

1396 Millard pirated this theory very extensively.

1398 I do not claim any expression

1399 copying here. That is why I didn't put it into the 66 Parallels.

1414 Mr. Martineau: [summing up]

You asked the question, "What do all these fantastic clues mean?" You, for the first time, asked this.

Then you answer it: "They were to show that Booth was full of bravado, and had contempt for his pursuers."

1415 Eisenschiml: Plus the stage melodrama. That is the touchstone. If you include that, I go with you.

1416 Millard copied my idea of the significance of these clues, plainly in pirating it.

1424 19 (x)

"The significance of Stanton's delay in broadcasting Booth's name until too late to reach the morning editions."

1425 The fact of the time when Booth's name was broadcast is on record. So is the time when the morning papers came out.

But no one but myself put an interpretation on 1426 these facts. This I claim is my literary property.

1427 Millard pirated it on pp. 114 and 115.

P. 114—"For one thing, Secretary Stanton waited about 4 hours before releasing the first notice of the assassination to newspapers."

P. 115—"He waited another hour after that—until the morning paper would be well into press runs— before announcing the name of the suspect they were supposed to be seeking."

By these comments on the delay,

1428 Millard infringed my property.

I don't know that I am competent to say whether a sound inference becomes an accretion to a historical fact. In my opinion it does.

1429 I agree that if a historian draws a good inference from a fact to illuminate it, then it becomes part of a historical fact.

1431 ff. 19 (dd)

"The reasons for the premature arrest of Arnold and O'Laughlin."

1456 ff. 19(ff)

1456 "The significance of the discovery that O'Beirne—
was recalled—"

1465 ff. 20 (b)

"That the conspiracy was more wide-spread than generally supposed, and that it pointed to Stanton."

1468 The consensus among historians and writers,
1469 De Witt, Laughlin, Oldroyd, was that the conspiracy was confined to the conspirators who were put before the bar. The charges against all others blew up, and were no longer mentioned in the books.

Others expressed suspicions, but I substantiated mine.

The charges hurled at Johnson all concentrated
1470 on "Cui bono", who profits? It was a political maneuver. I pinpointed this suspicion on Stanton.

1482 I cannot agree that Millard did not pirate my con-
1483 clusion, because that is the kernel of the nut. His whole article is pointed that way. It all builds up to the same conclusion.

The sentence "That the conspiracy was more widespread than generally accepted, and that it pointed to Stanton" is as fair a summary of the condensed
1484 context of my book as you can make in a few words.

Millard gives the thing the same treatment. He asks questions, but between the lines he suggests the answers.

In the lines too, on page 105, Col. I, par. 5 from
1485 bottom—(Reads)

"But as Lincoln sketched his humanitarian plans, he knew full well that some of the smiling, attentive faces before him masked hatred. To radical Republicans like the weasel-souled Stanton, every breath Lincoln drew was anathema. If he lived through these four new years of administration, every dream and

scheme they had for raping the conquered South would be shattered."

This I would say is pretty close to pointing the finger at Stanton.

1487 Millard says "if he lived through these four years."

This is not a politcal fact, but a speculation with a very sharp point.

1490 It is a direct, veiled accusation against Stanton, and a piracy of one of my ideas. It is the kernel of my book.

1493 I put the finger on Stanton less directly than Millard does.

Martineau: To that he differs from you in what respect?

Eisenschiml: He is just putting it into stronger language.

1494 Martineau: Dr. Riddle agreed that the tenor of Millard's work was to present it as a mystery story, that he asks all these sensational questions, whereas Eisenschiml established to a high degree of prob-
1495 ability the answer, namely that Stanton was guilty. Do you disagree?

Eisenschiml: To this extent: The title of this book is a question mark, "Why Was Lincoln Murdered?" To that extent Millard runs parallel with me. I answered some questions, and so did Millard, or indicated a possible answer.

1496 Dr. Riddle also said that Eisenschiml left some questions unanswered, and carried the ball only as far as the evidence led him.

Two experts never agree on everything. Substantially I agreed with him. There are certain small deviations where I may have a different opinion.

1507 The two duplications in the 66 Quotes were due

to stenographic mix-ups, because they were not prepared at one time.

Sandberg had my permission to use my Parker material, and got it in advance. It was orally given.

1508 I suggested that he confirm this with the publishers. I don't know whether he did.

1511 My other article about Lincoln, besides the one in Coronet, appeared in the Sentinel, a weekly magazine.

1512 I did not cite my sources in that.

1513 ff. 19 (a)

I claim that I was the first person to suggest that there was a mystery about Lincoln's death. The standard books are strictly narratives, containing no hint that there was a mystery that still had to be explained. Lloyd Lewis did not write a specialized history of the assassination.

1513-1514 He treated one feature as a mystery, while I comprised not a singular event, but the entire death story. Anybody who digs into my sources and confirms them certainly has a right to say that there is a mystery.

1515 This applies to the facts or factual material in paragraph 19 (a) to 19 (ii) as amended in my affidavit.

1517 ff. 20 (a)

I claim distinctly I was the first to state that "the conventional story of Lincoln's assassination is inaccurate and that efforts were made to becloud it."

1518 The phrase "and that efforts were made to becloud it" is really the contents of my book all the way through.

1518 ff. 20 (c)

I have never seen it mentioned anywhere that the Radicals and Stanton stood to gain by Lincoln's death.

(Martineau reads from Lloyd Lewis, "Myths", Chapter "Black Easter".)

Eisenschiml: I can't see that Lewis suggests here that the Radicals stood to gain by Lincoln's death.

He means that the Radicals wanted to implicate Jefferson Davis and the Confederates.

I do not make the broad claim that no one has the right to say without my permission that Booth was being protected by some high personage.

He can say it, if he substantiates it by going to research.

Lewis himself does not suggest that Johnson was implicated. He sort of ridicules it, by saying "rumor piled upon rumor", "whispering", "gossip" etc. He thereby throws doubt on his own statements.

He puts up a straw man and knocks it down with a vengeance.

ff. 20 (e)

"Why those who wanted to pursue Booth and knew where he had gone were prevented from following him, and why the organized pursuit was intentionally misdirected."

Eisenschiml: I would not say that some subsequent authors could not discuss this. I would say that they should not state the results of my research without my permission.

The emphasis is on the two "Why's." It was not a known fact that somebody knew where Booth had gone until I described it in my book.

It is a fact that the pursuit was misdirected, but it had not been pointed out prior to my research. The telegram [on the pursuit] was on record, but no one before me showed that the directions were false.

This is in Quote 32.

1542 ff. 20 (f)

"Why the wires went out of commission?" With the emphasis on the Why I think is my literary property. No one before me gave a theory on the why.

1543 This runs through the Chapter VIII, "How the News of the Tragedy was Handled." I not only took the known facts, I presented a great many newspapers that had never been mentioned before, including such outlandish ones as the Macon, Georgia News.

1544 I presented new evidence. The second thing I did was to interpret it.

1545 My explanation was that it was done to prevent the early editions to print the name of the murderer.

1546 I claim that it was an inside job, and all wires were under Stanton's censorship.

I pointed out that if the assassins had wanted to interrupt the wire service they would have cut the wires. This had been generally assumed prior to my investigations.

1547 Not only had no one before me suggested that, but no one had questioned or investigated the motive. In this connection Stanton was a partner in the crime.

1551 Millard does more than state known historical facts. He implies very strongly that Stanton had ordered it.

1561 I made no tabulations of the difference between Millard and myself. There are differences. There are quite a few parts of his article that I would not consider anywhere infringement, where he got his in-
1562 formation from other sources. I certainly would not say that he plagiarized somebody else; and I agree that he did some independent research on them.

1563 ff. 20 (g) (Quote 28)

I claim I was the first writter to say why the news

of the assassination was not allowed to reach Richmond and other southern cities until it could be assumed that Booth had passed beyond them.

1564 The news reached them on April 17 or some time thereafter. This is the only historical fact implied in this statement. The rest is deductions and explanations.

I do not claim that I was the first to say when the news reached Richmond. There are other sources, including the Confederate War clerk Jones.

1567 I claim about all the items (a) to and including (o) in paragraph 20 of the affidavit, that the deductions, conclusions and speculations no one else has
1568 the right to print, without my consent unless he goes to the original sources.

1570 I did not spend a lot of time helping Mr. Gertz prepare the case, except for the technical help.

1571 ff. Paragraph 21

I claim Millard made historical errors. These he did not get from me.

1581 Mr. Daigh was mistaken in characterizing Mr. Mason as my friend. I don't think I have seen him 3 times in my life.

1587 So far as treatment copying by Millard is concerned I would have gone farther than Dr. Riddle.

1588 I recall some instances where I disagreed with him. For instance Quote 59.

1589 Dr. Riddle said "No internal evidence of lifting". Millard said "Stanton was late. Stanton was always late to Cabinet meetings . . . to feel the power of his position." (P. 105, Col. I, par. 5, line 3.)

1590 Eisenschiml said: "Stanton . . . usually came late. It was his way of indicating the superiority he felt." Millard closely paralleled it.

I believe the point was made this this was terse language and could hardly be done differently. I disagree.

1591 For instance: "Stanton made it a practice to make a belated entry so as to show that he considered himself closest to Lincoln." or "Nothing could show Stanton's vanity better than his habit of letting the other Cabinet members wait for his appearance." or: "Stanton liked to have it appear that he was the most important member of Lincoln's advisers. To emphasize this, he usually did not make his entry until the rest had been kept waiting."

These are some possible variations.

1592 I therefore feel that Millard got it from me, not from Gideon Welles, the original source.

1596 You asked me, "If it is a sound inference, then it becomes an accretion to the historical fact . . ." I answered "Yes, and so did Millard. That is a rather dangerous statement to generalize on. Who is going to be the judge whether it is a sound inference?"

1597 It is my position that no inference becomes itself a fact, although Dr. Riddle says it does.

1598 ff. Quote 51

Martineau: Lt. Baker quoted in a book "only one door of the barn was open".

Eisenschiml: This was not written in a book. It is in the Riddle papers in Western Reserve at Cleveland.

1599 The papers had never been sorted until I came there. I had to open the boxes.

1608 ff. Quote 13

Dr. Riddle said "A very slight coincidence of language." I say it is very pronounced. I cannot possibly say that it is slight.

1612 Dr. Riddle compared this language with that of Sandburg, and you will remember that the squawk-

ing of ducks and a couple of other things were not in Sandburg. I believe it was in Bryan, who gives
1613 me as reference, and does not quote me almost verbatim, as Sandburg does. I agree with Riddle that Millard is closer to me in language than he is to Sandburg.

1614 My next instance is Quote 27.

1615 I do not agree with Dr. Riddle that there is no significant treatment copying there.

1616 I feel that Millard must have lifted that from me. There is no original source. It is just an observation and Millard's words are a copy of my expres-
1617 sion, in addition to being a copy of my idea.

My next instance is Quote 38 in which Dr. Riddle said no language copying. I believe that is a close resemblance of language.

1618 My next instance is Quote 43, in which Dr. Riddle saw no language copying.

I claim that Millard is very much closer to me than he is to Baker. My words do not resemble Baker's.

1621 My next instance is Quote 49, where Riddle said,
1622 "There is some coincidence of language, but I would make no point of it."

1625 I feel this is significant language copying.

1626 My next instance is Quote 64.

1627 Riddle said, "The literary parallelism is quite minor." I feel that Millard here copied my language as well as my idea.

1628 I differ with Dr. Riddle here on something that has nothing to do with language. He stated that the
10:13 hour is a historical fact. I say it is not a fact, it is a theory I have established. If I only approximate something it is a conclusion, not a fact.

1629 My next instance is Quote 65, in which Dr. Riddle saw no treatment copying.

1630 I believe this paraphrases my language and parallels my ideas.

My next instance is Quote 35—

Dr. Riddle thought the semblance in the second paragraph could not have been stated very well in a different manner. This is the sentence:

Millard: "That close O'Beirne came to making his capture then."

Eisenschiml: "That close O'Beirne came to getting his man." Here are possible variations: If O'Beirne had kept up his chase only a few more hours, he would have caught Booth.

or: O'Beirne missed catching Booth by the narrowest of margins. or: Booth never knew what a narrow escape he had and so on ad infinitum.

I bought a copy of True for February 1953 on November 5, 1953, from the A.B.C. Magazine Co. in Chicago. I had my secretary order it, I paid for it.

I do not know what Ralph Newman did in connection with reprinting Why.

I do not know of my own knowledge that Millard was invited to speak before the Civil War Round Table in Chicago.

I think Millard may be sincerely and passionately interested in the Civil War, and is not just a hack writer.

Quote 1

I believe that Millard lifted this from me because when a man copies from a source which he is willing to acknowledge he will make changes only either in order to enliven or shorten it. Unnecessary changes just involve more work. Why then change "the town" to "the little village", but particularly "40 to 80 miles" to "40 miles", when he thereby ruins his argument? That indicates to me that he tried to hide his source, which he

would not have done, if he took it from the original source.

1650 Millard uses a little poetic imagination in that Quote, fictional treatment, which he did not lift from me.

1652 ff. Quote 3

1653 I said that the language the writer in the Whig Press used is confusing and might easily lead someone to believe that the note which was published on the 19th, appeared on the 14th.

1654 I feel that if Millard had looked at the original article he would not have been confused as to the date.

1655 A man looking at a newspaper for reference naturally looks at the title and the date. I don't see how it could have escaped his notice that it was the 19th.

1656 My own sentence was involuntarily obscure, because to be historically correct I tried to copy the original as much as possible.

1657 I reported the notice as a historical curiosium. It has nothing to do with adding to the sum total of historical knowledge.

1658 Any subsequent writer could use it, by either geting my permission or by going to the original source.

Wherever I quoted directly, I tried to parallel my sources as closely as I could.

1660 Whenever, unless a work was in the public domain, there was a chance that a copyright existed, I made an effort to get permission.

1661 ff. Quote 9

On a cursory glance, I would say that in this instance my language is closer to the original source than Millard is to mine.

1662 I did take Millard to task for bringing in the servant. It shows to me that he did not read the original article.

1663 I said that I was closer to the original than Millard, but when I read this over, I think that is even-steven.

1665 I do not think that Millard differs from me about the news which Stanton received. He telescoped that part, by omitting one sentence. He cut out Seward and jumped right to Lincoln.

1670 ff. Quote 17

As to 4 corners evidence of treatment copying,

1671 I only had "Scoop of the century" and "Newsbeat of the century".

1672 This is not a fact, which could be gotten from an original source, it is an observation.

Millard could have arrived at the same observa-

1673 tion, but he expressed it in exact synonyms; that is the point.

Quote 21.

1674 ff. Millard gives Sandburg as one of his sources, but Sandburg said he would take it almost verbatim from me, and so he did.

1675 It could not have been from Bryan, because Bryan misspelled Burns' name, calling him Burke instead of Burns.

Quote 26.

1676 I particularly called attention to the words "flatly refused", which both I and Millard used, but which are not contained in the original article.

Yes, I do claim to be the first to tell the Gleason story, except Gleason. It had been completely ignored. Gleason is the source.

1677 The "flatly refused" is not the whole point. We both use almost identical language, and both of us

are quite far away from Gleason's story. I did not
1678 parallel Gleason, but Millard very closely parallels me.

Quote 29.

1679 The reason I did not parallel Gobright's story is that he is a windy guy. I boiled him down and straightened him out. I only paralleled his facts, but used very little of his language, as you will note.

1680 ff. Quote 36.

1681 Here I paralleled my source in the first paragraph.

1682 Here I think there is a parallellism between my version and the other authorities cited.

1683 In the first paragraph I think Millard lifted about 33% of his language from me, beginning with "the cipher operator", and up to "Stanton".

1684 In the second paragraph there is the "order to
1685 remain on the Maryland side".

1686 This gives it away. All other authors say "he was refused permission."

1687 I infer that since he got that much from me, he
1688 may have gotten the rest of my Quote 36.

1689 ff. Quote 39.

1690 My argument is that I plucked this particular statement of Bates' out of a large number. It is strange that Millard should pick the same one.

1691 No, I did not pick it because it summarized the whole thing. It was one out of several quotable quotes, such as I read into the record, and I just flipped a coin and took that one.

I do not exclude the possibility that Millard had read the original source, but in connection with the next paragraph my argument is considerably strengthened.

1692 In regard to Browning the argument is this: Usually I would have put his middle initial "H"

there, but for some reason I omitted it this time. Then I call him "later Secretary of the Interior. He too
1693 calls him [that]. Then he quotes exactly the same quote I used, and in the same sequence in which I quoted the two.

There were a number of quotable quotes from Browning.

Millard also left out Browning's initial and calls him "later Secretary of the Interior."

1694 The whole thing simmers down to a mathematical probability or improbability, on which the Court will decide.

1695 ff. Quote 40.

When I visited the Surratt Tavern in 1933, the orchard was there, but no barns or sheds.

1696 I got my facts from an 1867 newspaper.

1697 It was the Washington Chronicle of May 21, 1867. It is not now in my possession.

1698 There is nothing about this in the Lincoln Herald, which was introduced here and marked Exhibit 32.

1699 Millard testified that he thought he got his material from Baker. He could not have gotten it from Sandburg.

1700 ff. Quote 41.

1701 My source was a book, "Baked Meats at the Funeral", by Miles O'Reilly, which Millard admitted he had not read.

1706 ff. Quote 47.

Mr. Martineau: Your point is that nowhere except in your book does it appear that Herold said, either admitted or confessed or asserted to Dr. Mudd that the reason they wanted to go to the Potomac was so they could find a boat going north.

Eisenschiml: This is correct, and I am very positive that it does not appear anywhere [else]. Other authori-

ties mention the call on Dr. Mudd, but no more.

My authorities are the original archives.

1707 That is now Exhibit 28.

1709 Millard not only imitated my language here, he almost copied it.

1709 ff. Quote 54.

1710 At the time I wrote Why I did not know of certain facts, which I discovered later, and therefore stated only as probable [that a promise of clemency was held out to Mrs. Surratt]. When I wrote the Shadow I could state so positively, due to Col. Wood's disclosures in the Washington Gazette.

1711 I think Millard lifted that from me.

1712 That hope was held out for Mrs. Surratt so she would keep her mouth closed before the trial began,
1713 is mentioned only in that paper, of which I own the
1714 only copy in existence.

This was not a historical fact in 1937, but a surmise on my part. It did not become a fact until I discovered Wood's disclosure.

1715 In Baker's book, where Mrs. Surratt's lawyers tell of hoping that she would get reprieved, (which is Millard's source), that was after the trial.

1716 Millard's expression—copying here is slight.

1717 My point is that he used my research and paraphrased a sentence.

1717ff. Quote 67.

The only source which gave Michael Henry's name is the letter to O'Beirne.

1718 I consider this a significant piece of copying. The bartender Henry is of no importance, but Millard could not have gotten the story about him from anybody but me.

1719 I don't know why I let Henry creep into my story.

1720 Historically, it is trivial.

1728 (Mr. Martineau withdraws his objections to any questions by Mr. Gertz in connection with Millard deposition).

1729 Mr. Gertz: You also had written interrogatories of Mrs. Millard and we had cross-interrogatories.

Mr. Martineau: She remembered nothing so we were not going to offer them.

1730 Mr. Gertz: I would like to offer her answers, but only as the testimony of an adverse witness.

(Discussion between counsel as to source material.)

1735 Mr. Martineau: It is understood that we will put our source material together, which will take about a week, and you can then decide what you want to do about it.

1739 Defendant's Exhibit #1 (Millard's original manuscript) is received in evidence.

1740 Defendant's Exhibit #2 (Deposition of Ralph Daigh) received in evidence.

Defendant's Exhibit #3 received. (Contract between Millard and Fawcett.) Mr. Gertz objects thereto.

1741 Defendant's Exhibit #4 (Photostat of "The Spy Who Saved the Union") is received. Objection.

1742 Defendant's Exhibit #5 (The 66 Quotes) offered and withdrawn (p. 1743).

1743 Defendant's Exhibit #6 (Riddle's notes) is received.

1744 Defendant's Exhibit #7 (identical with Plaintiff's Exhibit #7) is received.

1745 Defendant's Exhibits #8 and #9 received. Objection.

1746 Defendant's Exhibit #8 is identical with Plaintiff's Exhibit #5 of Millard deposition.

1747 *Eisenschiml's Cross Examination (continued)*
By Mr. Martineau.

1748 Defendant's Exhibit #10 (identical with Plaintiff's #13) is received. Objections as to portions thereof.

1749 This letter I wrote to Millard on July 26, 1946, does not refresh my recollection of his visit any more than I testified before. I have a hazy recollection that he visited me in my library. I thought Millard's finding a relationship between Baker and Sherman very interesting in a general sense.

1751 I recognized Millard as a historical digger, I did want scholars to dig into the problem [of Lincoln's assassination] if they would come up with new facts.

1752 I wanted to stimulate further research.

1753 I hoped Millard might do that. I said in my letter that people must be mentally and financially able to continue this search. I know now and suspected then that Millard has not got the money. He has my blessings if he finds new facts, but not with rehash. Rehash is not research and I do feel that he rehashed me.

1755 My letter was sincere praise and encouragement. I am ready to give a willing hand to the younger generation, in the hope that they will carry on.

1756 In scientific work, if anyone would dare publish something under his name as an original article, that already has been published, he would be ostracized and thrown out of every scientific society.

1757 If a scholar gives due credit to what has been written before, and uses it as a framework for further building or a foundation for a further thought, that is perfectly permissible.

1758 We have already agreed that Millard's article contains certain matters he did not get from me, but this

does not constitute research in my sense. If you go to the library and see what the other fellow has done, that is rehash. Research means digging out new material, never before known, like Millard's digging out the Baker-Sherman encounter in San Francisco.

1761 When I spoke of historical dynamite in my letter to Millard, I had not only Stanton in mind, but particularly the necessity of re-writing of the Civil War.

1763 Martineau reads from James Randall's review of Why. (Mississippi Valley Historical Review June 1937.)

1763 ff. (Questions and answers with respect thereto.)

1764-1767 • • •

1768 ff. Martineau: Do you agree with him, when he says "His [Eisenschiml's] book does contain evidence elaborately searched and ably analyzed"? (Mr. Martineau reads other passages. Discussions and questions and answers.)

1772 (Martineau offers the Randall review in evidence, and it is received subject to objection.)

1773 Martineau reads from a review by Chas. R. Wilson of Colgate University. (American History Review, Vol. 43 1937-38)

1774-1775 • • •

1777 I say in my epilogue that other historians should tackle the evidence I have submitted, and either prove the thesis or demolish it.

1778 On p. 437 I say: "A great deal of new evidence must be brought to life before students can write a definite answer to many questions that confront them in their research of Lincoln's death." There is the essence of what I mean.

1779 ff. (Martineau reads from Wilson's review.)

1780 (Mr. Gertz objects to whole line of questioning.)

1782 I agree to this part: "The point that many

strange incidents are easily explained by the hypothesis that Booth had a powerful ally in official circles."

Will you allow me to say a word? During our previous hearings the question came up sereval times, when
1783 is a hypothesis a fact? I find that I have not been consistent in my testimony. If everybody accepts some hypothesis as a fact, it is still a hypothesis,
1780 and a hypothesis can never become a fact, because when it is proven it is no longer a hypothesis, then it is a fact.

That is the difference between a fact and a conclusion. An inference is not a fact regardless of what I said before, even if everybody accepts it.

1785 I differ with Dr. Riddle on that.

1786 Everything in my two books is either A) an indisputable historical fact or B) an inference drawn from it, or C) a hypothesis suggested by the fact.

(Wilson's review is offered as evidenec and received subject to objection.)

1787 (The review of Why in the London Spectator is received in evidence subject to objection.)

1789 (Defendant's Exhibit #7 is identical with Plaintiff's Exhibit #7.)

(Martineau offers the review from the Saturday Review, March 27, 1951 as Defendant's Exhibit #11. Received without objection.)

1790 ff. (Martineau reads from it.)

1792-1806 • • •

1807 My summary, in which I claim priority for "the deductions, conclusions and speculations", does not mean that there is evidence against Stanton. It is distinctly marked as a speculation, not evidence.

1809 You are not correct in assuming that the factual

material which I claim to have discovered does more than point at Stanton. It is circumstantial, not direct evidence. I draw very much of a distinction between the two.

1811 The evidence I have presented against Millard is not circumstantial. It is not a parallel case to that against Stanton.

1812 I have a great deal of respect and affection for Mr. Millard. I think he acted in good faith, but didn't know the law. He said so himself. He thought that what had appeared in print was allowable for everybody.

1814 Mr. Gertz: It is not the province of the witness to argue the law or facts . . .

Mr. Martineau: I feel that in a way he is more qualified to judge the evidence than you or I.

Mr. Gertz: And he has reached the conclusion that there is a literary piracy. He said that.

1815-1819 • • •

1821 Martineau reads from article by Paul Angle, which is Defendant's Exhibit #7.

1822 • • •

1824 In my book I did not edit the facts, I assembled them, and omitted those which were not pertinent.

1832 I still stand by my language in Exhibit 20: My surmise that Stanton hated Lincoln, and that he and the Radicals stood to profit by his death. This last speculation is the underlying thesis of my two books. In appropriating my thesis, Millard practically appropriated my books.

1834 I present certain facts, but rather than let them float around in a vacuum, I support their validity by arguments, but I draw no conclusion. I point out

1835 the possibilities.

A thesis without arguments would just be a bunch of suspicions thrown out wild.

Millard's appropriation of my thesis goes all the way through his article:

Page 105, column I, beginning "But as Lincoln sketched" to "would be shattered". That is the essence. From then on the rest is detail.

The main theme of the Shadow alone has been described by Angle as a long footnote to Why. It gives a lot of details for each chapter, and some new slants. You'll find a chapter on Stanton, one on Mrs. Surratt, also one on

Booth's escape and curiosa.

Several chapters hang

very closely together.

I do not think I am going into that main thesis of Stanton's possible complicity, in this

book.

Stanton walks through the book to the extent that he evidently did not want the truth to come out.

Only to that extent.

Inasmuch as the Shadow has no main thesis, I cannot claim that he appropriated it. He took certain portions,

which I have indicated in the list of parallels. Numbers 1, 2, 3, 37, 40, 41, 42, 50, 51, 52, 58 and 64.

Martineau:

By taking portions of the chapter "Vox Populi" did Millard ruin the market for it? Is it not a rather unimportant chapter? . . .

Eisenschiml: I will put it this way. If a long story ends with a good joke and someone takes the joke, he took the best part. Millard took the best part.

By taking Quote 37 (or 53) he took the heart out of this chapter, its shining part.

You ask if Quote 40 is very important? It is important so far as this lawsuit is concerned. Otherwise, no. It is a nice descriptive item.

Martineau: I am trying to barge into what might or might not be fair use.

Mr. Gertz: You and I will discuss this.

Martineau to witness: Did you expect that future writers would make use of your two books in furthering human knowledge and entertainment?

Eisenschiml: In a critical way, yes.

I would follow general usage. My books are open to the public within the limitations of the law and those of usage and good taste. General usage would mean asking for permission, with or without compensation.

I agree that a bibliography or credits are not customary in the popular field.

I intended my book for serious Lincoln students—

I am not competent to say whether True is a popular-type magazine, or if it appeals to the same readership, but with a circulation of two million copies, it would hit almost every strata of society, including serious readers.

I really do not know for sure whether it destroyed my market.

I only know that my agent has not been able to place it. I am aware that Bishop's book "The Day Lincoln Was Shot" was not hampered by Millard's article. It shows that the publishers themselves are poor guessers.

(The book is marked Defendant's Exhibit 12.)

I think it is written for the popular taste * * * and I also think that events have proved this claim of mine unsustainable.

1867 Why had a circulation of about 22,000, Shadow 3600.

1868 Mr. Martineau: Are you making a claim against the publishers of Bishop's book?

Mr. Gertz: The Bishop book infringed the Eisenschiml book, and the publishers and Bishop have made a settlement.

1870 (The Blue Book for February 1955 is marked Defendant's Exhibit #13.)

1871 Defendant's Exhibits 12 and 13 received subject to objection.

1872 Motion by Gertz to strike both exhibits.

1873 Eisenschiml: No, I can't go along with you when you say that the Quotes 1, 2, 3, 37 and 40 or 41, 42, 50, 51, 52, 53, 58 and 64 were fair use by Millard of my work.

1877 *Direct Examination of Ernest Samuels*
By Mr. Martineau

My name is Ernest Samuels. I live at 3116 Park Place, Evanston. I am a professor of English at Northwestern University.

I began as instructor in 1942, and this is my first 1878 year as a full professor. I taught at the State College of Washington from 1937-39 as instructor in Business English and American literature and miscellaneous activities. I was visiting associate professor at the University of Chicago in the winter quarter of 1950. I have done teaching at Bryant and Stratton College from 1931-36.

I received my Bachelor's degree at the University of Chicago in 1933, Juris Doctor in 1926, Master of Arts in 1931 and Doctor of Philosophy in 1942.

1879 I was admitted to the Bar of Illinois in 1928. I have not practiced.

I have written two text-books and a critical biography of Henry Adams in 1948. I have written reviews
1880 on composition rhetoric and reviews of works on the Adamses, etc.

I was inducted a corresponding member of the Massachusetts Historical Society last fall.

I received the Guggenheim Award to carry on work on the second volume of Henry Adams.

1881 I believe I have become familiar with the techniques of writing a work on history. I am trained in the various techniques of scholarship.

1882 One of my painful tasks was in my work as Director of Freshman English for five years. I had to serve as a kind of court of intermediate resort for problems in classroom plagiarism and copying. I
1883 learned a great deal about the nature of the writing process and of originality. I had to determine whether students plagiarized from each other or from magazines and books.

1884 A. Well, if when confronted with irrefutable proof and the irrefutable proof that I always preferred was to have a page of the student's theme and a page from, say, a book in which the two were verbatim copies. That I have always felt was conclusive.

I made a study of the work of Millard's article in True, and read Eisenschiml's two books, Why extremely closely, Shadow less so, because I felt its bearing was not so important.

1886 Roughly speaking, I spent 75 to 80 hours doing it. I have an opinion as to whether Millard's article is an independent literary creation.

(Mr. Gertz objects.)

1887 It is.

1888 (An outline of Samuels' testimony is marked Defendant's Exhibit #1, 5-16-55)

(Objection by Mr. Gertz to line of questioning.)

You asked me for the basic principle I apply when confronting a literary work. I don't want to argue that Millard's article is a work of fine literature.

Martineau: We will concede that, I think.

A. Yes. In approaching a literary work of whatever sort the first concern, it seems to me, of the literary critic is what is the nature of this work, and that concern is with the nature of the work as a total work of art, as a literary entity, and hence you will be concerned with questions of the structure, the architecture, for want of a better word, of this literary work, and in order to determine what makes these words hang together as a literary pattern one would want to seek the theme, and as I have said, the structure, the tone.

Now, those are primary considerations, and they are based upon, in my judgment, sound common experience of the educated reader. He goes to the work as a whole poem, as a whole novel, as a whole history and so on. And any other consideration, that is, of the parts of the work which make up that whole are obviously subordinate and subsidiary to the aggregate that makes it up, and it can fairly be said, and I am here talking about basic principles that in the case of a literary work as in any other rtistic work hold, the whole is always greater than the sum of its parts.

When the structure as a whole is understood then we can understand the relationships within that work of the parts, and also we can understand what relation that work as a literary work bears to any other literary work that may be similar or different from it.

And in connection with that analysis I would like to suggest that the principles are as old as Aristotle, the question of the beginning and the middle and the end. I

have jotted down some of the principles that are familiar in American writing.

Edgar Allan Poe, who has been in a sense rediscovered as our greatest early critic, said, "Every work of art"—if I may quote this, if it is relevant—

Mr. Gertz: Of course, all of this is subject to objection so I am not interrupting.

The Witness: Yes. "—should contain within itself all that is requisite for its own comprehension," and he stressed the unity or totality of interests. "The true critic will but demand that the design intended be accomplished to the fullest extent by the means most advantageously applicable."

1894 The effect Millard has aimed at is not the effect of history or of scholarship, as in Eisenschiml's schol-
1895 arly works, but it is to titillate the reader, and although you have the appearance of historical fact, that is not the essence aimed at.

You have a mixture of fact and fictional devices which makes the thing as a whole completely different from scholarly work.

1896 To get at the character of Millard's work, first we have the internal necessities of what the editors have imposed on the writer. There is a certain kind of audience you are trying to reach to give a particular thrill.
1897 I deduced the readership from, for one thing, the advertisements of whiskey, skin bracers, tobacco, cars, firearms, etc. There would be no place in such a magazine for a work of scholarship or for foot-
1898 notes. With that object, the writer will jazz up his article, give it a sense of drama—suggesting the macabre, the irrational, the portentous, the ominous, all things that appeal to superstition.
1899 From the very beginning, there is an air of mystery, of bafflement, of confusion, of chaos, and it is

maintained to the very end.

Millard was not interested in establishing a fact, in answering questions, but rather he was relishing asking them. If a man wanted the answers, he would have to go to Eisenschiml or find the direction in which the answers would be.

Millard's work is filled with ill omen and superstition and that sort of thing.

1900 He speaks of the strange paradox at the very opening, that the more we know about the case, the less we know.

At another point he speaks of every time you come upon a mystery, it uncovers an even deeper one, and he leaves it there.

Then there are literary touches; Lincoln is assassinated on Good Friday—the rain that falls.

1901 I think Crook hears, and for this, I am told, there is no historical basis, Lincoln moaning in his sleep. And it is Lincoln himself having premonitions.

1902 Millard speaks of three ominous portents of the coming catastrophe on p. 104. Then there are patterns—Lincoln, Grant and Baker act out of character

1903 because Fate is at the bottom.

I was tremendously struck by the difference between the two works. In Eisenschiml fate is not at

1904 work, but rather is a working hypothesis is developed, rather well supported that there is a place behind all this seeming chaos—that Stanton and the Radicals Masterminded the whole business.

1905 Re-Parallels.

1906 The great danger of source hunting and parallel hunting is that you will attribute only one source to a fact or quotation.

The greatest fallacy is this conception of the single source. Sometimes the source may be in the fact that two

writers are dealing with the same circumstances, and what they will say is bound to be similar; and since we are using a common language will be frequently suspiciously identical, because the historical events dictate the treatment.

What struck me as soon as I looked at the affidavit is that there is a superficial and convincing closeness, and I confess that when I first looked at these I thought how amazing the closeness [was] . . . until one discovers that they are brought together out of the context, and that they form only a very small part of either work.

I should like to refer to a book "The Theory of Literature", where it is pointed out that the scholar, when he sees some superficial resemblance, must be reasonably certain that it cannot be explained by a common source.

In this case we have a common-place subject, one that has been used again and again.

Parallel hunting has been widely discredited recently. Parallels must be real parallels, not vague similarities. According to Alexander Lindey, (Harper 1952) "they have a limited help in plagiarism suits . . . they can clinch a genuine case of theft, but the narrow nature of their function must never be lost sight of . . . The crucial test of plagiarism must be the reading of the rival works in their entirety."

It was clear that Millard's work was not an original piece of research. He was using pieces from Eisenschiml, Sandburg, Pitman and others. Which made it one thing quite different from what is obviously a remarkable piece of historical scholarship like Eisenschiml's books.

(Pages 59 and 60 of Lindey's book "Plagiarism and Originality" are marked Defendant's Exhibit 3 and admitted, subject to objection.)

The scholarship of Eisenschiml's book Why is shown by footnotes and lengthy quotations from his sources, and documentation.

Eisenschiml's books are written for people who read a scholarly book, certainly the Shadow would not have a popular appeal. He is, it seems to me, throwing his discoveries into the common stock of knowledge . . . and expects that his facts, ideas and inferences will be used and popularized and frequently abused.

Eisenschiml's thesis is that Lincoln's assassination has never been adequately explained, and would lead a person to adopt a working hypothesis that Stanton and the Radicals were responsible.

Stanton is named about eleven times in the first ten pages, is the villain of the piece, although there is a disclaimer. It is not an indictment, but the implication was plain to me. The object of the book is to correct history.

In Chapter 2 Eisenschiml points out that the responsibility for failure to protect Lincoln lay squarely on the shoulders of Stanton. That is Chapter 4, page 31. In Chapter 5 he concludes that Stanton lied about Lincoln's visit to the War Department (P. 39). In Chapter 6 Stanton is shown to have had secret knowledge. (P. 49). On page 52 he should have warned Lincoln, but didn't. In Chapter 7, page 64, if the investigators had questioned him, they would have given him an extremely uncomfortable quarter of an hour.

In Chapter 8, he refers to Stanton as still being in power in 1868, thereby affecting Gobright's story. In Chapter 9, page 96, "The only road that Stanton failed to bar was the one by which Booth escaped."

In Chapter 10, "Did the War Department really make possible Booth's flight . . .? The evidence is pri-

1923 marily negative, "but the road was left unguarded."
Chapter 11, "Pitman's re-editing of Fletcher's story was hardly done on his own initiative." Chapter 12, Stanton's questionable behavior toward O'Beirne, preventing Booth's capture.

Chapter 13, page 115, Stanton's equivocal behavior
1924 at the news of Lincoln's death. Chapter 14, Eisenschiml reserves the question who was shot at Garrett's farm. Chapter 15, "The faked attempt on Johnson, pages 173, 174—who could have singled out Lincoln and Seward.

Chapter 16, page 177, "Stanton's novel torture to protect himself and his colleagues." If Booth was killed
1925 intentionally, Stanton and the Radicals were involved. Chapter 17. The members of Stanton's Inner Council are presented as accomplices.

1926 Chapter 18. Stanton's unwillingness to bring back Surratt, and his efforts to convict him. Chapter 19, The Assassination is only one incident in the Radicals and Stanton's struggle for power.

1927 Chapter 20. Stanton selects the judge for the conspiracy trial, who had been instructed to convict. Chapter 21. The use of the fraudulent photograph to convict Dr. Mudd. Chapter 22. The vindictiveness of the Bureau of Military Justice. "The conspiracy in
1928 higher places" point in the direction of Stanton and his group.

In Chapter 23 Eisenschiml declares only one theory offers an explanation for dividing the persons into two groups, those who had to be silenced, and the others.
1929 Chapter 24. Stanton wanted to postpone the end of the war, so as to obliterate the South.

All of this bears upon Stanton being in the central place as the villain and we are getting answers or probable answers, whereas in Millard you have none. He evades the

1930 answers.

Chapter 25. Strange things in the conduct of the war are attributed to Stanton. Chapter 26. The Radicals expected to profit by Lincoln's death, but there is no evidence of their complicity.

1931 Chapter 18. Johnson's strange patience with Stanton has remained an unsolved mystery. This hints at Johnson's implication. Chapter 29. Stanton profited
1932 by Lincoln's death. He became the de facto President.

The two works are different in character, in their direction, in the expected audience and Millard's
1933 work is importantly an original work, just as in its scholarly and historical way Dr. Eisenschiml's work is importantly an original work. Millard's hero or villain obviously is Booth, to whom he devotes a good deal of attention.

1934 I did not gather from Millard's work that Booth was just a tool of Stanton. There is an illusion to Stanton, which does not materially affect the whole drift.

1935 In Eisenschiml's work the literary art is suppressed, although very often it is clear that the literary man is at work, but he is working under a wrap.

1936 Millard's narrative technique differs from Eisenschiml's. He uses devices of dramatic preparation, so the reader will have a hint of what is coming.
1937 He also indulges in fancy and is hunting the occult, like Good Friday, and Booth having his heel caught when jumping from the box, in the U. S. flag.

1938 There is the difference in Millard aiming at the emotional effect, the entertainment, against the intellectual conviction, which is Eisenschiml's aim. The

1939 difference in emphasis, in the standard of accuracy, which makes Millard an original work.

I have examined the parallels. There is obviously no copying of language except ten words that looked like direct copying, though they might be verbal echoes.

I believe Millard consulted Eisenschiml, so I can see no copying.

Now as to common sources, these parallels would necessarily appear from any man who is familiar with the 1940 literature and used the material Eisenschiml has and later ones, like Bryan's and Lewis' books.

Mr. Gertz: That isn't any exhibit. Let's not refer to it as an exhibit. You mean a document that you prepared.

Mr. Martineau: I thought it was to be marked as an exhibit.

Mr. Gertz: Well, I am objecting to the introduction of it.

• • •

1941 (A notebook is marked Defendant's Exhibit #4, of 5/16, 1955.)

1942 Martineau: This is the drawing together under one cover of the source material referred to at our last hearing, prepared so we can find these books in evidence without handling these big books. It really should be 60 Exhibits.

Samuels: This is the sort of research that need to be done when you are working out scholarly problems. Is there a unique or is there a common source between Millard and Eisenschiml.

1943 The most important refutation of copying is the common source, hence in going through this (Defendant's Exhibit 4 of 5/16/55) it supported what was basically an impression that there were common sources.

One would wish that all people who borrowed would

give credit, but it is an almost universal practice now, and generally among scholars considered fair use to use material, so long as it is not substantially copied. In looking over these notations I was struck again and again by the fact that these adequately accounted for what, at first blush, when I was looking at the affidavit, seemed like borrowing.

Q. In other words, the impression you get after looking at this Exhibit 4 or the excerpts contained therein is that if Millard borrowed he borrowed from the common source?

A. That is true. That is true.

1944 From the acknowledgments that have been made, Millard borrowed from Eisenschiml, but that Eisenschiml was only one of many sources.

Martineau: In your opinion, would Millard, who admitted having consulted Eisenschiml, tend to take it from Eisenschiml instead of going to the original source, because of the laziness in human nature?

Samuels: Well, that depends on how interested Millard was in Lincoln material, and the indications are that he is.

1945 There were two instances where Millard copied. I should have made a note of that.

1946 When facts or ideas are contributed by a scholar, they may be used so long as they are not used in the same literary style or organization, so that there is an improper use of someone else's effort. I find no evidence of Millard imitating Eisenschiml's organization, except that the chronological scheme is followed by both.

1947 There are one or two points in the list of parallels.

Quote 10

"And afterwards Stanton swore under oath—that Abraham Lincoln had not been . . ."

"Stanton . . . testified under oath that Lincoln did not visit."

There are similarities of language but not identities.

1948 Quote 4.

"In his memoirs Grant skillfully slid over"

"Grant passed over"

The parallel here is very limited. It is a rather natural expression, and the writer could hardly know whether he was recalling. It is a copying of a fracture of a sentence, but I nowhere saw any extended copied passages.

1955 Yes, you have agreed to compensate me.

1957 I take The Shadow to be a group of related essays pertaining to problems associated with Lincoln's as-
1958 sassination. It has no governing thesis.

1959 *Cross Examination of Mr. Samuels by Mr. Gertz.*

1963 When I wrote my preliminary opinions I knew a firm was representing the defendant in an infringe-
1964 ment action. I have never seen True cited as a source in any scholarly article. I did not know it was the subject of a Congressional investigation, governmental orders, etc.

1965 My statement as to True's readership was an educated surmise. I had no first-hand knowledge.

1966 The contents of True were distinctly second and third-hand for the most part, sensational and ex-
1967 citing. It belongs to a sub-world of the sensational. A Million readers represent a pretty wide section of
1968 the society. The title of Millard's article seems appropriate to me.

1969 Eisenschiml's title "Why?" is less formal than commonly used in scholarly work. It opens the door a crack. It is exciting material, and I felt that occasionally it would carry Eisenschiml away. Some is the very same

material in Millard as in Eisenschiml, exciting events.
1970 I remember p. 5 of Why, the dramatic setting, the
1971 14th of April. There are passages like that in which Eisenschiml indulges, but it is not the prevailing temper of the work. In addition to p. 5, there are here and there a number of passages which have that kind of literary framework. It is the same kind of style. It is not all dry as dust. It exploits the interest of the material, but that exploitation is always subordinate to the historical point.

1972 The fictional picturization of the death scene in True impressed me.

1973 Mr. Gertz: Do you know who that man was who is protruding from the box?

1974 Samuels: Was it Major Osborne?

Gertz: No.

I don't know of any errors in the appearance or position of that major.

1976 I am not sure whether Lincoln was slumped over as in the picture. On p. 36—the photograph is not
1977 toned up. I believe it took four or fewer soldiers to carry Lincoln's body.

1980 There is pretty respectable advertising in the February 1953 issue of True. I think there would be a reasonable difference of opinion as to its character. It is of lower grade than in the so-called quality maga-
1981 zines. There is much of it that would also appear
1982 in Life, the Saturday Evening Post, Harpers or At-
1983 lantic. On the other hand, there are kinds you would not find in them.

1986 I had nothing to do with the preparation of Exhibit #4. I read the greater part of it, some more
1987 closely than others. I examined every sheet, and read
1988 most of it. I did not actually check if the first entry from Badeau's "Grant in Peace" was accurately

transcribed, or if it was in context. I do not know if Millard looked at the works cited in Exhibit #4.

1989 A. Well, I attempted to do that and I discovered that there were references here to exhibits that I did not have, so that after a time I gave up, and read them with a view to informing myself, since this is a considerable amount of research, on what common sources would have been available, and I was assuming that Millard did have access to these sources, also.

Now that, of course, was simply an assumption that I was making.

Q. In other words, you did some random rather incomplete sampling?

1990 A. So far as I was able to, because I didn't understand, for one thing, the numbering. You will recall that in the Plaintiff's Exhibit, the first—there are forty quotations from "Why", and then there are another group from "The Shadow," and the numbering —I wasn't able to follow through whether the numbering adopted here was a continuous one, you see.

Q. In other words, you didn't actually make a complete comparison?

A. I did not make a complete, I made only a partial.

Q. What you would call a sampling?

A. Well, as far as I could go.

1990 Mr. Gertz asks witness, where in Exhibit #4 is a reference to Quote #2 in Plaintiff's affidavit, then 1991 extends the request to Quotes 2, 3, 10, 12, 17, 21, 22, 23, 30, 32, 34, 40, 43, 44, 47, 48, 49, 52, 63, 65, 67.)

1993 The first quote was #2. I would have to go through 1994 rather carefully since I did not prepare this.

Mr. Gertz: Is it not a fact that none of the Quotes I listed are referred to in any manner, scope or form in Defendant's Exhibit 4?

Samuels: I am not in a position to answer without

study. I was struck by the amount of material that was outside Eisenschiml's book.

1995 The very first time I saw those (66) parallels I fell into the fallacy of being amazed by their similarity.

What amazed me was that in looking at these par-
1996 allel columns, were the apparent resemblances, and it was not until I went back to the books that I realized how the context completely altered the bearing of these quotations. I was surmising or guessing that Millard read other sources.

1997 Subject to the qualification that I am not an ex-
1998 pert in the field, I will grant you I gather that this hypothesis of Eisenschiml's that Stanton was implicated in Lincoln's death is a novel one.

It does not appear in the Millard article. That is, there is a fragmentary allusion.

(Mr. Gertz asks witness to show where in Exhibit 4 there are references to the sub-paragraphs of paragraph 19 of the affidavit: C, D, M, N, P, Q, Z.

1999 And references to these sub-paragraphs of paragraph 20: F, G, L.)

2000 These parallels though taken from Eisenschiml do not constitute a material part of the article.

I am not an expert on the death of Lincoln.

2001 My familiarity with the Civil War and Lincoln stem from my preoccupation with the Adams family. I read Why more than once, and of the Shadow the relevant chapters. It was a very interesting example of
2002 scholarly method.

I have never gone into the question of the exact time of the shooting. I thought it was an amusing part of Millard's pattern, the superstitious twist, 13 being an unlucky number.

The assassination did take place on Good Friday and I assume it was in fact a cloudy and rainy day.

2003 And it is true that Lincoln did in fact have various dreams about which he talked.

I don't think he moaned in his sleep. I don't know that any scholar has so written.

2005 Mr. Gertz: Does not Eisenschiml dwell upon the Good Friday, and the omen and a whole series of things the way Millard does?

Samuels: He is not taking it as omens, does not exploit them.

This does not indicate that Millard is not really the kind of scholar who would go to the sources. It is a question, what is a source.

2006 Eisenschiml would try to go to documentary sources, wherever possible. For the purpose of this Millard article it would be sufficient to go to secondary sources, De Witt, Eisenschiml, Lloyd Lewis.

Those would be his chief sources, although he may have been interested in original material too.

2007 As to paraphrastic copying, that raises a question of judgment, how close a paraphrase would be.

2008 Where the paraphrase is fairly close, and the intention felonious, I would feel that it was improper.

To a limited degree I would make parallel columns in my detective work.

2009 The standard I would usually follow is, was there extensive copying, so that without it there would be no theme.

2010 Aside from parallel columns, before one looks at
2011 a particular passage, you read the whole thing.

You ask if I would consider a paper copied, if some passages are clearly copied, and in addition others are not.

2012 I would tell the student "Use quotation marks and cite the source."

Millard uses that in his article, "as so and so says."

2014 (It is stipulated that, subject to verification, the paragraphs, quotes and sub-paragraphs listed by

2015 plaintiff as being omitted from Defendant's Exhibit 4 of this date were in fact omitted therefrom.)

Quotes 1, 2 and 3.

2016 You ask if I think it significant that Millard quotes the same instances of premature publication in his quotes 1, 2 and 3 that Eisenschiml does. I would say taken by itself I would regard it as having some significance.

2017 I would want to see if this is the sole source and these three the only ones cited in other works.

I don't know if they were cited in other works. I don't know.

My previous answer covers whether there are any sources other than the one cited first by Eisenschiml.

I do not know if the Middletown Whig Press car-

2018 ried an article in regard to the assassination.

I do not know whether the paper carried the news on April 14, 1865. I assume Eisenschiml's statement is based on research, and Millard's on secondary research.

If I knew that the paper did not carry the news on April 14, I would say he was romancing.

I don't think that he was misinterpreting Eisenschiml.

2019 If Millard misread Eisenschiml, you ask, would it be in my judgment, a good indication that he had

2020 copied or utilized Eisenschiml's work, I would hesitate to say that it was conclusive. It would give me pause.

Quote 4.

You ask if I were told that Millard admitted that Eisenschiml was the first to call his attention to the material therein, would it influence my opinion as to whether he copied Eisenschiml.

2021 I think it would have a bearing, yes. When I said copied, I am using that loosely, that he was indebted to Eisenschiml because it is not a direct copy.

2022 (Witness reads the two parallel Quotes 4.) There is a similarity, and it might have come from Millard's having read Eisenschiml's book, but there are

2023 other possibilities. He might have gone to the original source, Grant's Memoirs.

2024 Mr. Gertz: In Grant's Memoirs, Grant does not say that he skillfully slid over the incident, does he?

Samuels: It is quite possible that this is a verbal echo.

2025 It may well be that one is taken from the other, that for these specific details Millard may be directly indebted.

2026 These details do not affect my analysis. There could be many passages copied.

Even if assuming that all 66 Quotes were copied, the Millard article would still be original, overall. These parallel columns are a classic illustration

2027 of the vice of the parallel column.

Mr. Gertz: How many instances would it take to persuade you of overall copying?

Samuels: There is obviously no formula. You can have ten thousand similarities of words. The important thing is, do they fall into the pattern which constitutes an independent work.

2028 If another expert reached the opposite conclusion, it would not be a sound opinion.

2034 You are asking me to pass on the competence of Dr. Riddle.

2035 I find it difficult to answer that question sensibly.

2036 Mr. Gertz: Now if a court of law has decided that the quantity of copying has nothing to do with 2037 the question of infringement, would you say the Court is wrong?

Samuels: It would certainly be unwise in every case that a Court would be justified in ignoring quantity. There are cases—and this would be one—in which 2038 the mere quantity would not be controlling.

If Millard did a good deal of copying—that is a good deal of indebtedness which he has not acknowledged, it would not overall be evidence that his work was not original.

Mr. Gertz: Is it not possible in your judgment for a man to copy substantial portions of another work 2039 and yet in other portions of his work be highly original?

Martineau: I will concede that it is possible.

Samuels: Yes, there certainly is a possibility.

2040 Mr. Gertz: You know that, legally speaking, you can be guilty of infringement even if there are original elements in your work, as long as there are portions copied from another work?

2041 Martineau: We will concede that under certain circumstances that could be. It depends on how much was copied, and what proportion it bore to the whole, how important it was, etc.

Mr. Gertz: Referring to Millard, will you give me in categorical fashion what you regard as the highlights of his article?

2042 Samuels: The theme of the article is the mystery,

2043 to a degree supernatural, that surrounds the assassination, and that its purpose is developed by exploiting them—the elements of horror, the foreboding, the evil fate which accompanied the downfall of a great man.

2044 (Gertz reads from Millard article, p. 105, col. 1, par. 5.)

2045 Yes, this is positive in tone. It is not simply asking questions but making pretty definite answers and conclusions. There are a number of references to Stanton.

2046 Yes, there are a very great number of references to Stanton in Eisenschiml's book.

Yes, there are more references proportionally to him in Eisenschiml's book, more importantly. In his book Stanton and his clique simply dominate the book, but it seems to me he should have done more with Booth.

Yes, there are references to Booth in Eisenschiml's book.

2047 But not in the same way. He is not treated there as a kind of hero.

No, I do not know any source for the material in the paragraph read before other than Eisenschiml.

2048 It seems to me that Welles tells of it—the struggle between Stanton and Lincoln is the commonplace of history. If I recall anything about it.

Gertz: I am talking about the specific reference to the effect that Stanton and the Radicals desired Lincoln's death.

Samuels: It seems to me that it would be a safe statement for anybody to have made.

Gertz: Will you cite me one work in which that
2049 conclusion is stated other than Eisenschiml's?

Samuels: I could not state that as a fact.

2050 I would not say that the 66 Quotes represent a
2051 substantial part of Millard's article.

It would be impossible to work out which portions I regard as more significant in Millard's article than those 66 Quotes.

The article is a complete article—organic.

2053 Taking p. 195, either qualitatively or quantita-
2054 tively—qualitatively the question arises whether the
2055 parts have an indispensable relation to the test.

Well, the data have a relation, and the article would be altered, if these facts were missing. Whether the alteration would be substantial, I doubt.

I would say the story of John Parker is a significant element in Re Millard article.

2059 You asked me about the Parker passage, whether it formed a significant part of the page on which it appeared.

2060 This is predicated on a kind of quantitative theory.

I certainly should have added that this analysis would not admit either of a quantitative or qualitative because the terms are misleading.

2061 Parker is an actor in a drama, and the one person
2062 who stays in character. That is one of the values of the use of the Parker episode. One has to consider the piquant details about the bawdy house, etc. and also the purpose of Eisenschiml's treatment. He wanted
2063 to correct history, whereas in Millard's case Parker's significance is that the safety of so great a man should depend on so weak a vessel. In the Lincoln assassination story Parker is one of the important figures.

2064 Some of the material lends color to Millard's article, one of its functions.

I was paid a fee for my preliminary opinion and was paid or promised a fee for additional services in developing my opinion and testifying.

I am to be paid for my time on this matter.

2064 ff. (Testimony as to meeting with counsel, hours, etc.)

2069 Mr. Gertz: Q. Now, when you sent this letter of
2070 December 5, 1954, had you read the Millard article in full?

A. Yes. Yes.

Q. And had you read the Eisenschiml book "Why Was Lincoln Murdered?"

A. Yes.

Q. But you had not read "In the Shadow of Lincoln's Death"?

A. No.

Yes, I did no research on the assassination spe-
2071 cially before writing my letter of December 5, 1954, but not for this purpose of writing it. Nothing extended.

2072 Re—Defendant's Exhibit 4, with the heading "Source Reference Data Sheets";

2073 I was acquainted with some of these sheets with varying degrees of acquaintanceship, when I expressed my opinion [on copying], and I am acquainted with. In some instances I am pretty well acquainted, in others not so well, and still others not at all.

2075 My knowledge whether Millard read or consulted any particular book in their Exhibit 4 would come secondhand. I never met Millard.

2080 I cannot categorically answer the question whether works cited in Exhibit 4 have reference to the Quotes that are indicated at the bottom of the respective pages.

2081 In some cases I took the page and compared the excerpt with the Millard article and Eisenschiml's books. I started out attempting to do that, but I did not understand the numbers, but in the case of a few pages I expressed my surprise at how full the detail was. I had

not known that such sources might have been used for Millard's article. In quite a few cases I did not make the comparison. I suppose in most I did not.

2082 I did not have the book and the article before me, except in mind and recollection.

I did not look at Exhibit 4 until a few days ago, although it was, so to speak in my custody for about five weeks.

2083 It appears to me, simply on examining the documents, that some of Millard's research was done using Eisenschiml's books. I inferred that some of it was as a historical source.

2084 In a few cases there was at first glance an apparent similarity of phrases.

There were some similarities of ideas, of factual detail, so that it could appear that Eisenschiml's work had been used as a literary source, as a historical source.

2086 I have never before appeared as an expert in an infringement case, nor have I written anything on the subject.

In order to detect copying in some cases I use 2087 specific tests, in others I go at it backwards, which I felt is the approach through parallels. However, once you have suspicion concerning two works, then you read them to see what the configuration is.

2088 The configuration is made up of very complex factors—the overall theme, the tone, the structure, the patterns, those are the essence regarding the nature of both works. Much of that is an act of judgment, based on a tremendous amount of reading, because you need taste.

This gives you the judgment as to whether there has been substantial imitation.

2089 Then you begin looking for specific passages, which would show, for example, that the writer has had access to something else.

There is a rhetorical purpose and an imgainary one.

First, you have to determine the genre: is it straight history, is it a combination of fact and fiction, is it
2090 poetry? Each one would have its own principles.

I cannot answer categorically whether I have ever been wrong in my judgment.

It would be fair to say that sometimes I changed my mind.

Gertz: Suppose that Millard prepared, after suit was filed a set of about 60—3x5 cards to correspond
2091 with the 66 Quotes, and on each card placed what he says he recalled as the source used by him, and none of them contained any reference to Eisenschiml, but at a deposition later, he admitted that he derived some of his material from Eisenschiml, would you consider that significant?

2092 Martineau: Subject to verification, I will admit that none of the Millard source cards contained any reference to Eisenschiml.

2094 Gertz: Assuming that Millard prepared about 66 cards for preparation in testifying, and that on each card he placed what he said he recalled as his sources, and that none of those cards had any reference whatso-
2095 ever to any writings of Eisenschiml, and that he testified, both on direct and cross-examination that he did consult these writings—would you regard that as significant in determininig whether he copied from Eisenschiml?

2096 Samuels: I think that question is confused by the word "copied".

2097 If a student of mine did something like it, I would ask him, "Why did you omit listing your authorities?" And I would be interested to know his answer. He may simply have forgotten.

2098 I have not seen Millard's deposition—nor that of

Dr. Riddle, nor that of Eisenschiml or Naughton,
2099 nor any of the testimony in this case.

2101 Gertz: Suppose that there was a collection known as the O'Beirne papers, which was in the possession of Dr. Eisenschiml, and which contained material never published except in the Eisenschiml books, and suppose that Millard never saw that collection, and that in the Millard article language from this material appears.

2102 Would your opinion as to the originality of Millard's article change?

No, it would not.

2103 Q. In other words, even if Millard took material from the Eisenschiml books based upon the O'Beirne papers you would still say that he was original?

A. That the article was an original composition.

Q. You mean overall or in detail?

A. No—well, overall. The question of what—of the relevancy of the detail is something else.

Q. In other words, you are ignoring detail, isn't that true?

A. No, I am not. No, the details play a part in the composition.

Q. Would you say the passage—

Mr. Martineau: Let him finish.

Mr. Reuben: Let him finish for once.

The Witness: The details play an important part in the composition because you can't have a composition without the details, but I would like to insist that the whole is greater than the sum of the parts, and an important question is, how is the detail used.

Mr. Gertz: Q. Let's give this example: Suppose in detail a literary production in each of its component parts is taken from other writings—

A. In every—

Q. Yes.

2104 Mr. Martineau: From a number of other writers, Elmer?

The Witness: You mean something like Burton's "Anatomy of Melancholy"?

Mr. Gertz: Q. Suppose an article in a magazine, everything in the article, you might say "This is taken from Sandburg, this is taken from Eisenschiml, this is taken from Lloyd Lewis, this is taken from XYZ."

A. You mean is it conceivable that there can be an original article under those extraordinary circumstances?

Q. Yes.

A. It is conceivable.

Q. But unlikely?

A. Well, not unlikely because men have—great men have made great reputations, and Burton's "Anatomy of Melancholy" is one of them, an extraordinary compilation, and considering the amount of stuff that Lawrence Sterne poured into "Tristram Shandy"—

Mr. Martineau: Elmer, in your question did you assume—see if I understand it correctly—that the taking from these different authors was a verbatim taking

2105 and it was just sort of assembled together, put together.

The Witness: That is what I assumed.

Mr. Gertz: In some instances were verbatim, in some instances paraphrased, in some instances—

Mr. Martineau: Just so he understands the question.

Did you understand the question?

The Witness: Well, conceivably, yes, under those circstances.

2105 I don't think I was consciously hunting for similarities or dissimilarities between the two author's works.

2106 I did look for similarities of language. There were

similar details.

2108 There are two paragraphs that are pertinent, one is paragraph 19, one 20 [of the plaintiff's affidavit]. The difference between these two paragraphs is misleading.

2109 Gertz: I asked you to list the similarities between the Millard article and the Eisenschiml books, both of language and substance.

Samuels: Of language I found extremely few,—

2110 that went beyond accidential ones.

2112 I would say that there are similarities. I would say that most of these in paragraph 19 indicate similarities, but I would reserve the nature and what they signify.

2113 In 19 (A). That there was a mystery about Lincoln's death. There is a factual similarity.

19 (B) That Parker was a key figure, there is a similarity, appears as an actor in both,

2114 19 (C) that Mrs. Lincoln was responsible and that [premature] reports of Lincoln's death had been published in various papers.

If there is an indebtedness here [it] is one of fact, because the language is not copied.

19 (E) The advertisement in the Washington newspapers. I believe that is shared information.

2115 The significance of the note the messenger handed to Grant.

2116 So far as paragraph 19 and 20, historical facts, conclusions or surmises goes, there is a considerable amount of similarity.

2117 In 19, the greater portion are historical data, shared by two or three works.

The significance is something else, the use made of

2118 them is frequently different.

Eisenschiml dismisses the pre-publications as drivel, whereas Millard simply speaks of a strange

wind that swept over New England. He uses these basic facts, to provide an effect of strangeness, of the occult.

The raw facts are shared. How they are used is wherein the originality of Millard and that of Eisenschiml separately consists.

2120 Paragraph 20 differs from paragraph 19, the first referring to facts, the second to deductions.

2121 The interpretation of these deductions are, in my
2122 opinion, different. Millard rather carefully avoids answering the kind of "why" that is so much of Eisenschiml's essence.

There is one point I know I would question. I would question 20 (D), that Booth was protected by some high personage and that his road of escape was known
2123 and kept open.

2124 The literary significance in all these cases is special in Millard and special in Eisenschiml. Millard makes a different literary use of them, in most cases.

The 66 Quotes.

2125 In going through them, I can safely say that I am impressed by a similarity of factual details. It could well have been that Eisenschiml's work was a source for the underlying basic fact, not the interpretation or the particular use. The language is remarkably different, when you consider how similar the facts often are.

2126 You ask if in trying to reach a judgment, I consider paraphrases, abridgments, imitations. That would enter only at a certain stage. Having satisfied myself that one work is an imitation of another, then I would seek for details.

2127 Efforts at concealment is one of the most difficult questions in literary study. I do not consider it conclusive proof. It would certainly make me suspicious.

If a man deliberately, with intent to deceive, denied, then my suspicion would be up, but often you can account for what seems almost identity of language.

2128 Gertz: If a writer is inaccurate in quoting or using a source, does that not show that he is slovenly or else trying to conceal copying?

Samuels: Well, to err is human. It would be indicative that he has been careless in that one respect. I doubt whether it would be a fair inference of slovenly research.

2129 Millard was trying to write fact fiction, a kind of hybrid genre.

2130 You ask whether it is right to copy from somebody else without permission and acknowledgment. May I change that to "borrow". Good scholarly practice demands it, but in fact, it is just too expensive.

2131 In popular writing, the practice is never to use
2132 footnotes.

2133 Q. You see nothing morally or legally wrong in taking substantial portions—

A. Well, you don't want me to indict my own civilization. I have felt privately that I wished that as an author people would give me credit. Even scholars—I have resented the fact that other scholars—they are nice fellows, but why didn't they give me credit? But it is part of the practice. No great harm is done.

Q. In other words, you say it is okay because people do that, they habitually steal?

A. Because it is a universal practice and the harm is negligible.

2134 If Millard had admitted that in several instances he took his material from Eisenschiml and if the internal evidence shows that in other instances he did not go to the source, but took his material from Eisenschiml,

and if he testified that he would not think of disputing Eisenschiml's word, I don't think one can make a legitimate inference from that. I may say that I think every historical conclusion is a historical fact. That Lincoln asked that Eckert be assigned as his guard and Stanton refused is a historical fact.

Gertz: Suppose that Stanton gave a reason for his refusal and Eisenschiml said that was not the reason at all. Is that a fact or a hypothesis?

Samuels: If the hypothesis is sound, one begins to treat it as a historical fact.

Gertz: If George Bryan says that Stanton's reason was that he wanted to discourage Lincoln from attending the Theatre, is that a different explanation?

Samuels: Even though these two explanations are different, and contradictory, they both are historical facts, from the view of history. I consider a hypothesis a fact, when the facts are the data of history.

I have been looking at Plaintiff's Exhibit #20. I get the drift of it.

You ask if the summary of Chapter III in Why at the bottom of page 2 and the top of page 3 of Exhibit 20 is accurate, and also the parallels between it and the Millard article.

The first sentence seems correct to me; the second, as to it never having been published before, I assume is true.

I don't believe the third sentence is true. ("Millard's sequence of incidents is somewhat different from mine, but his build up closely parallels mine.")

There is not enough there for me to form an opinion.

As to the second paragraph, I don't agree. Millard does not begin his article with identically the same premature notice.

As to the rest of the paragraph Millard's account of Parker's career may well have been drawn from the facts of Eisenschiml. The use of them is quite different. So far as this is a summary of basic facts, there is a similarity.

By basic facts I mean, for example, that Miss Harris' testimony was contradicted by Major Rathbone. It may be true that this was discovered by Eisenschiml, and thereby became a matter of American history.

The suspicion that the witnesses had been influenced by the War Department is not adopted by Millard, I believe. In Chapter IV there are similarities of the historical data.

Quote 13

Most of the data appear in both works, and I would say there are similar words, but that there is a deliberate pattern recognizable to show copying is open to question.

On page 108 in Millard I see the words "profane, coarse and insolent language". In Eisenschiml: violent, coarse and insolent language. That is similar, yes. In Eisenschiml it is not under quotation marks, this is narrative. It is possible that this could be stated without using practically identical language.

I believe this is only one of many examples of trivia that occur through all writings, popular and scholarly. My personal morals would be to use quotations.

This kind of verbal echo is very common. This does not make it right, but it also is not wrong, unless it is the soul of the thing.

I do not believe that Millard's use of the Eisenschiml Parker material is a paraphrase. Certainly it is not a

close paraphrase. The facts are not related in the same order.

2172 (Samuels is asked to read Quotes 13, 14, 15, 34, and 34A, all relative to Parker.)

2173 I don't think Millard paraphrases Eisenschiml. There is an appearance of paraphrase. What Millard
2174 has done, is to take the picturesque, and the language he sometimes uses is more effective in dealing with the facts for his purposes.

I don't know whether it would be a correct description to say it is rather a loose paraphrase of the chapter. In a paraphrase, as I understand it,—

2175 Q. Can't there be a copy where some sentences or paragraphs or pages are inverted?

A. No, I wouldn't call it a paraphrase if you rearrange the materials, because then you change the relation of the parts to each other.

Q. So that all a person has to do to escape the charge of copying is to change the paragraph order or the page order?

A. No, the skillful rearrangement of material, the rephrasing of it, it seems to me, makes it a new work for the purposes we are considering here.

Q. All right. Still asking about the Parker material, will you set forth—take all the time you want—any material in the Millard article with reference to John Parker which is not also contained in the Eisenschiml books?

A. That is an interesting question.

2176 Q. All right, then I will phrase it this way and you listen to the question and answer it: Assuming that the substance of everything about John Parker contained in the Millard article appears in the Eisenschiml book "Why Was Lincoln Murdered?", and assuming further that there is nothing about Parker that ap-
2177 pears in the Millard article that does not also appear in the Eisenschiml book, would that be significant to

you in determining whether or not there is copying?

The Witness: Would this answer your question, Mr. Gertz: that it appears to me that Millard is indebted for most if not all of these factual details to Dr. Eisenschiml's book. Is that what you were asking me?

Mr. Gertz: Q. Yes, I am asking you, and I am not putting words in your mouth, wouldn't that be significant to you in determining whether or not there was copying?

2178 A. Only if it was evidence in the first place that Millard's article was a plagiarism of Dr. Eisenschiml's book, that is, we have come full circle.

Q. Yes. Let me see if I understand you. I don't want to burlesque what you say. In other words, you reach a general conclusion first that overall there is not plagiarism?

A. That is, in those respects which determine, shall we say, the individuality of the entire work.

Q. The work in toto.

A. Yes.

Q. All right.

A. Then the next—

Q. Wait. Then having reached that conclusion you say that it doesn't make any difference how the details are?

A. From the point of view of plagiarism that is precisely right.

Q. All right, I just want to make sure I understand you.

A. From the point of view of plagiarism once it is clear that a comparison of the two works or the three works in the main lines and those details that I mentioned, that they are different works, one is original, then

2179 the so-called parallels become interesting as to the methods of research, as to the methods of research, but that is an academic and purely a literary question.

Mr. Martineau: And not legal or what?

The Witness: That is, I don't think it throws any particular light on whether plagiarism has occurred.

Mr. Gertz: Q. Well, you follow me now. I am not trying to put words in your mouth, and if you don't understand me, halt me. Assuming then, that for whatever your reasons you have reached the general conclusion that a work is in toto or by and large—

A. That is right, substantially.

Q. —an original work, then you would not revise your opinion even if you found scores of instances of similar or the same language?

A. Well, the number, I would say, is immaterial. It is their nature. It is their nature.

Q. I just want to make sure I understand you.

A. The number is immaterial. I would say that the canon in literary study is the one I have stated.

Q. And that is the basis upon which you reach the judgment in this particular case?

A. Yes.

Quote 3.

Millard may well have misread Eisenschiml's book. It is probable. It seems very likely that Millard did not go to the April 19 issue of the paper for his information.

Millard article has these angles: A, chaos, confusion, mystery, bafflement, horror. B, the occult, fate.

Eisenschiml does not accept the occult. He brings in the superstition, but it would reflect on his scholarship to say that he has taken the same—

(Gertz reads from page 5 of Why . . .)

Gertz: Isn't that just about the technique of Millard?

Samuels: That great events cast their shadows before is rhetorical license, but to suggest that the occult becomes

the controlling theme is an insult to Eisenschiml. It is one thing to use this rather dramatic introduction.

Within the limitation of scholarly methods Eisen-
2188 schiml has tried to make his book exciting. Millard was not so restrained. Oh, he gives one hint to the supernatural but it is not the center of his book.

(Gertz reads from page 30 of Why)

2189 Gertz: Is not there a lot of suspense in that?

2190 Samuels: There is suspense, but not like Millard's.

(Gertz reads from page 67 of Why)

2191 Gertz: Does not that hold suspense?

Samuels: There are many examples of suspense in scholarly books.

(Gertz refers to page 40 of Why, "Premonitions vs. Secret Service Reports".)

Gertz: That chapter is full of premonitions?

Samuels: Yes, they are taken as reports, but Eisenschiml takes no stock in them. Millard does.

2192 (Gertz reads from the chapter.)

Samuels: I have already testified that much of the occult and superstition is reported by Eisen-
2193 schiml, but Millard uses it as a theme, whereas Eisenschiml is referring to it in his analysis of his characters.

(Gertz reads from pages 3 and 4 of Why.)

2194 Samuels: This is an effective beginning, but not the type that Millard did. In handling his material, Eisenschiml has these touches but they do not control.

(Gertz reads from pages 43 and 44 of Why.)

2195 Samuels: This is not the same kind of fatalistic attitude that Millard had, Eisenschiml handled the material with tact and discretion, Millard almost frivolous.

2196 (Gertz reads from page 137 of Why.)

Gertz: Isn't that the same kind of fatalism?

Samuels: No. I find these flourishes interesting but it is not the heart of the book.

2199 ff. Testimony about Defendant's Exhibit 4 of May 16, 1955.

Quote 64.

2200 There is no reference in this excerpt from Bryan's
2201 book, that Booth fired his shot at 10:13 P. M. I would add that presumably the historical fact Millard took from The Shadow.

2202 Quote 24 (19V).

2203 I see nothing about the police blotter in this except from Bryan.

(Crook's "Through Five Administrations" is submitted to witness.)

2207 I do not see Crook's "Through Five Administrations" as a direct source for Quotes 13, 14, 15, certainly not as a quotation.

Re—excerpts from David M. DeWitt compared to paragraph 19, sub-paragraph 19 (R).

2209 There is no resemblance, no similarity of language, or substance.

2210 There is the statement of concealment in DeWitt,
2211 of the weapons being a mere blind to make it appear that the Vice President was the intended victim.

Re—affidavit 20 (O) compared to pages 174, 175 in Exhibit #4.

2213 Samuels: I don't see Lloyd's name on pages 174, 175.

2214 Re 19 (T) vs. pages 246, 247 in Exhibit 4.

2216 [Willful changes in the Official Record] do not appear on the page here.

Re Quote 50 excerpt on page 83 of Exhibit 4.

2217 Samuels: DeWitt says nothing about additional doors on all four sides.

There is nothing in DeWitt about the door being fastened on the inside.

Re 19 (A), 19 (F) 20(B) 20(I) and 20 (J).

(Excerpts from DeWitt, pages 172, and 173.)

19 (A).

(Mystery about Lincoln's Death).

Samuels: DeWitt's passage refers to a petition for Mrs. Surratt.

Samuels: 19 T says that the official record of the trial—

Gertz: Willful changes made in it by Pitman and—

Samuels: The only reference to the record in DeWitt in this passage is the omission of a petition. He says nothing about other changes.

20(A).

(The inaccuracy of the conventional story of the assassination.)

There is only inferentially something in this excerpt from DeWitt with respect to efforts to becloud the story. There is no direct statement [that part of the record was suppressed].

20 (B) and (C).

(DeWitt excerpt, page 272.)

There is something in DeWitt about the conspiracy being more widespread than generally accepted, by implication.

Gertz: The incident referred to by DeWitt occurred over two years later?

Samuels: It would not relate except as it would bear on Eisenschiml's thesis that Stanton and his party sought

to remain in power.

2232 Q. Yes, but pretty far-fetched, though, wouldn't it be?

A. I wouldn't say so. It is—

Q. All right. Let me ask this, then: What language in the excerpt that we have been mentioning from DeWitt would indicate that DeWitt was pointing out directly or inferentially that the conspiracy against Lincoln which culminated in his death in April, 1865 was much more widespread than generally accepted?

A. Only to the extent that there is the implication, as I see it here, that Stanton was involved—

Q. What language says that Stanton was involved?

Mr. Martineau: He just got through giving it to you in his previous answer.

Mr. Gertz: Q. All right, will you give me the language in this excerpt from DeWitt which indicates in your mind that Stanton was involved in the assassination conspiracy of 1865?

Mr. Martineau: I submit, your Honor, that the witness has given the answer at quite some length about two minutes ago.

Mr. Gertz: I didn't hear it then. I would like to hear it.

Mr. Reuben: He can read the answer, then.

2233 The Master: He can repeat it.

The Witness: That the excerpt here would indicate that Stanton faced the same problem—

Mr. Gertz: Q. I asked you to point out the language, the specific language. Read it.

A. He says "The President," and I assume the allusion there is to the President in 1867.

Q. That is right, Johnson.

A. Johnson, yes, "that he could no longer tolerate Stanton in his cabinet." This is part of—this cannot be—

Mr. Gertz: I would like the witness to be instructed to answer my specific question, which is simply to read the language aloud from DeWitt which suggests to him that DeWitt was saying that the conspiracy which culminated in Lincoln's death in 1865 was much more widespread than generally accepted.

The Witness: The statement here, you are asking me, requires that I adopt the terminology that the conspiracy was much more widespread. I can only do it if I am able to deduct what you mean by the conspiracy.

Mr. Gertz: I submit that the question is simple enough. It calls for him to read from the DeWitt—

2234 Mr. Martineau: I submit that the whole line of examination is ridiculous. The witness didn't prepare the exhibit at all and didn't even testify that he is an expert on the assassination of Lincoln.

The Witness: As to the possibilities—what you are asking me—

Mr. Gertz: I would like to have the witness instructed to point out the language from the excerpt from DeWitt which suggests to him that DeWitt says that the conspiracy was much more widespread than generally accepted.

The Master: Can you do that?

The Witness: I believe I can indicate that there is an implication here—

Mr. Gertz: Q. Give me the language.

A. An implication here of the motive of Stanton, and that this was Stanton's attitude, that Stanton's attitude was continuing, and that that would be a reasonable element in an assumption that Stanton may have been involved because of his stand in 1867, that it fits in, that it may fit into a pattern that there was the conspiracy.

Mr. Gertz: I would like the witness to be instructed to point out the specific language, to read the spe-
2235 cific language from the excerpt, which he hasn't done.

Mr. Martineau: He did.

The Witness: May I say that the question—

Mr. Gertz: Will the Master instruct the witness?

The Master: Wait a minute now.

The Witness: —that the question ignores the nature of literary and even of legal research. It assumes—

Mr. Gertz: What right has this witness to make a statement?

Mr. Martineau: He has the right.

The Witness: You are asking me—

Mr. Gertz: I have the right to ask him to read the language from the excerpt of DeWitt in which he says that it suggests to him that DeWitt is saying or suggesting that the conspiracy against Lincoln was much more widespread than generally accepted.

The Master: Can you do that? Can you find that?

The Witness: Yes. What I am asserting, taking up the word "suggesting," is that this suggests that Stanton may have been involved, that he may have been able to gain, and therefore—

Mr. Gertz: Q. What language, specific language?
2236 Read it.

A. If I may say so, the word "conspiracy" is not used, but the word "conspiracy" here is a summary conclusion.

Mr. Gertz: Will the Master instruct him to point out the language?

The Master: Can you give us the language on which you base—

The Witness: May I read again?

The Master: Yes, read.

The Witness: "The President told General Grant that he could no longer tolerate Stanton in his cabinet."

Now, I submit that there is a piece of data with respect to Stanton. If the conventional story of Lincoln's assassination does not implicate Stanton I would say here is a small piece that you might say could implicate Stanton, that is, that Stanton had a motive.

Mr. Gertz: Q. That is the language you refer to?

A. Yes.

Q. All right, that answers the question.

A. That is as far as I would want to go.

2237 20-B and 20-I and Quote 39
vs. DeWitt's "Judicial Murder of Mary E. Surratt", page 132.

2241 I see no direct reference to Quote 39. [in this excerpt]. If Millard had looked only at this excerpt, I don't think he could have written what is included in Quote 39. As to 20 (b) and 20(I) only by inference
2242 one could draw that there was a high military commission acting illegally, which it could not do unless high quarters were involved.

2243 I see no direct reference to the effect why this record of the conspiracy trial was deliberately doctored up.

2246 (Re—underscored passage on page 232 of DeWitt's book.)

2247 They are relevant to Quote 39 only in the sense— It does not mention the name of Browning or Bates, but I assume that is the only connection. It refers to the Milligan case.

2248 It could not be a direct source for Quote 39.
(Re. p. 105 of DeWitt's "Judicial Murder")

2249 and 20-B
(That the conspiracy was more widespread and reached high in Washington quarters.) Stanton's equivocal interest in the case would seem to the

reader as related to the conspiracy. In that sense there is a connection.

2250 Whether a remote one, depends on the purpose. It would be hard to say whether the connection is tenuous.

2251 20-L (The why of the doctoring up of the record) This could only be indirect.

(Now pp. 184, 185 of Exhibit 4)

With respect to 20-B, this would give rather con-
2252. siderable support. "It [the petition for clemency] must have been purposely kept from the—public by some person interested in the suppression."

2253 This might well be taken as evidence of a conspiracy. Suppression and doctoring would certainly be synonymous.

2255 I don't recall that Eisenschiml and Millard deal not only with the omission, but with the changing of the language by the official reporter.

(Now to pp. 159, 160)

2257 I don't know that Booth's diary did not appear in the trial record.

2258 There is a reference to the diary [in this excerpt] but not to mutilation.

2259 (Now to p. 199 in the "Judicial Murder")

Martineau: If there are any errors in the statements of this Exhibit, we will very frankly admit them.

. . .

Gertz: We will agree that the following excerpts from Exhibit 4 have no relevance to Plaintiff's affi-
2260 davit paragraphs 20-B and 20-I. DeWitt's "Judicial Murder" pp. 199, 200, 201, 235, 236, 225, 226, 107, 108.

2262 Martineau: Apparently, the person directed to prepare the excerpts has assumed to exercise some legal judgments in these legends below and draws inferences only proper for lawyers to draw.

2263 I apologize to the Court.

Gertz: One of the things that caused Samuels to reach his judgment with respect to non-copying by Millard was this particular volume (Exhibit 4). It was not the only thing, but it was one of the important things that caused him, he says, to change his mind, so it becomes very relevant.

2264 Samuels: I think I made it clear that my judgment was made even before I saw the affidavit, and I saw corroboration in this book (Exhibit 4). My impression was that some of the excerpts were relevant, and you have brought out that some were not.

2265 Re—Quote 26, excerpt from Laughlin.

2266 Martineau: It is an obvious error. There is no question about that. It has no relevancy.

Re—Quote 39.

I don't see the names of Bates or Browning, but . . .

Martineau: We will concede that.

2267 It would be my impression that in a general way it indicates that there was a grave miscarriage of justice in the execution of Mrs. Surratt.

Re—20-B and 20-D in regard to the same excerpt.

2268 This excerpt does not refer to the assassination. It simply says there was a conspiracy.

2269 Regarding 20-D I see only a similarity between the excerpt and 20-D in general way. It does not refer to the road of escape specifically.

2270 Martineau: I frankly admit it is improper to put in this document (Exhibit 4) and it should not have been put in. It is an argument.

Gertz: None of these excerpts are relevant, but I picked out what I regard as the most glaring examples.

2271 Martineau: I will phrase it this way.

2272 Defendant's Exhibit #4 of May 16, 1955, which purports to be a judgment as to the relevance of

these excerpts, to any part of Dr. Eisenschiml's affidavit, shall be withdrawn; that it was improper to have been made, because it amounts to a legal argument and should not have been made at this time in this exhibit, and I will agree right now that it should be withdrawn.

2273 Gertz: I agree to the proposed stipulation, it being clearly understood, however, that I am not waiving my contention that none of the said excerpts have any factual relevance to the paragraphs in question.

Martineau: Right, perfectly proper and satisfactory. • • •

2274 Mr. Gertz: Now let me state that since it is your exhibit I suppose you have the right to withdraw it, but you don't have the right to withdraw from the consequences of having put us to all of the expense and labor in connection with cross examination and preparation and the like, so that if you choose to withdraw it I can't stop you, but I want expressly to retain my right to ask for the taxing of costs and fees.

Mr. Martineau: Well, in that case then I guess I will just leave it in because I don't regard it as much importance either way. • • •

2275 Martineau: This legend at the bottom of each page I suggest be disregarded. • • •

2275 Mr. Gertz: All right, and then subject, again, to my contention that factually the excerpts in question do not in fact have any relevance to the quotes to which we have referred, and subject also to my contention that costs and fees are to be charged by reason of the inclusion of the said material we will consider this as having been withdrawn by you. • • •

2276 Gertz to Samuels: Have you read any books on the Lincoln assassination other than Eisenschiml's?

Samuels: Most notably Bryan's and Thomas'.

2277 "The Book Review Digest".

2278 Moore, "The case of Mrs. Surratt".

2279 Monaghan, "The Lincoln Bibliography".

2282 Gertz: Do you know of any book other than Eisenschiml's and Millard's which in any way seeks to implicate Stanton?

Samuels: My judgment is influenced by the reviews because they were written by people who knew the literature, that this is probably Eisenschiml's unique contribution.

2283 Stanton does not play a large part in the Millard article.

Gertz: On page 36, is the photograph of Stanton, and "Why did he refuse Lincoln the guard he asked for?"

Samuels: It is true that this is the only photograph in the entire article.

Gertz: [And the caption:] "Why did he refuse Lincoln the guard he asked for?"

Samuels: Yes.

2284 It is true that Chapter V in Why has the heading "Protection Refused President." and on page 32, paragraph 3, Eisenschiml says "This request Stanton refused point-blank."

Your question whether the particular reference in Millard's article is quite definitely derived from Eisenschiml is a non sequitor. I don't think there is any relevancy or similarity at this point.

2286 At the bottom of page 106, Column I and top of
2287 Column II, there are a number of references to Stanton.

2288 Stanton plays a role in the Millard article. There are many important persons.

On page 37 of the Millard article I notice underscored matters, but as to representing a pretty substantial
2289 part of the page, the words "quantitive" and "qualitative" have absolutely no meaning in literary analysis.

The underscored portions contribute to the narrative, but I would not say a good deal, because they are details.

2290 Turning to page 105, the only sense in which I could answer whether the underscored portions represent a substantial portion, both qualitively and quantitively, would be typographically; and there I would say they do not constitute a substantial part.

2294 I don't believe the importance of copied passages is a determining factor; nor that if a thing is not overall copied it is not copied at all.

2296 Whether a writer has the right to appropriate the research of another, as long as he phrases it differently, depends on circumstances.

2298 I don't see how Millard could have gotten this material about Burns from the Bryan book, if you say that Burns was not mentioned.

As to the matter about the bartender Henry,
2299 Millard would derive it either from Eisenschiml or from a common source. If Eisenschiml is the sole source, he would be indebted to Eisenschiml.

2302 Since Millard in the deleted portion of his article referred to Eisenschiml in connection with a particular passage, it would be a reasonable probability
2303 that he took other things from him. • • •

Mr. Gertz: Q. I am not sure that I got your answer to this question. In your judgment has any writer the right to appropriate the research of another without permission and without examining the same original sources?

Mr. Martineau: I think I will object to the question. It calls for a legal conclusion.

The Master: Sustained. It calls for a legal conclusion.

Mr. Gertz: Well, he is appearing as an expert on plagiarism.

The Witness: I can testify as to what the practice is, your Honor.

Mr. Gertz: No, you are not being asked that.

He is here as an expert on infringement.

The Master: I know, but now you are asking him
2304 a legal proposition.

Mr. Gertz: I am entitled to see what is in his mind.

The Master: The objection is sustained. Go on.

Mr. Gertz: I would like to argue that, your Honor. I am entitled to know upon what he bases his judgment. If he bases his judgment upon his belief that a man has the right to appropriate another person's research without permission and without examining the same original sources, then I say that he has disqualified himself as an expert, and I make the offer to show that this witness believes that a man has the right to take the research of another without permission and without examining the same original sources.

Mr. Martineau: All that the witness testified to on direct examination—

Mr. Gertz: I make that offer to this witness.

Mr. Martineau: All that the witness testified to on direct examination, your Honor, was that in his judgment as a literary expert Millard's work was an independent literary creation.

Mr. Gertz: I make that offer to prove what I have just said.

The Master: Just a moment.

2305 Mr. Martineau: He did not pass on any or purport to pass on any matters of legal right or wrong. He did, it is true, on cross examination, principally—he was asked certain questions concerning customs and, you might say, scholarly ethics or morals. Now, I think it is highly improper for him to be asked a legal question at

this time. It is a matter for the Court to pass on, your Honor.

Mr. Gertz: I make the offer to prove to this witness—

The Master: I will sustain the objection.

Mr. Gertz: Are you overruling the offer of proof?

The Master I am sustaining the objection made to that question.

Mr. Gertz: I make the offer to prove through this witness, Dr. Ernest Samuels, that Dr. Ernest Samuels believes that a writer has the right to appropriate the research of another without permission and without examining the same original sources.

The Master: That puts a different—

Mr. Martineau: I will object to that. The same thing.

The Master: That becomes the same thing.

Mr. Gertz: In other words, you are refusing the
2306 offer?

The Master: Yes, I am still sustaining—

Mr. Gertz: So to all intents and purposes it is that I have proved that?

The Master: I am sustaining the objection.

Mr. Gertz: As long as I have it in the record that I could prove that through this man.

The Master: It is in the record now. There is no necessity of taking up any more time on it. • • •

2311 Gertz: I want to call your attention to some language in your direct examination quoting from pages 1939 and 1940. (Quotes)

2312 Gertz: Now when did "Myths" appear?

Witness: I think 1929. That would place it before the Eisenschiml books.

2313 Gertz: (Quoting from page 1901 of testimony):

"I think Crook hears, and for this . . . I am told there is no historical basis . . . Lincoln moaning in his sleep, and as soon as I read that I knew that Millard—

and an author will frequently will do things drawing upon his unconscious literary memories . . ."

2314 Samuels: I don't recall that anyone specifically told me that.

2315 Gertz: (reading from Crook's "Through Five Administrations", page 13.

"When in my patrol I came near to the door of the President's room, I could hear his deep breathing. Sometimes after a day of unusual anxiety I have heard him moan in his sleep."

Samuels: I was prepared to say that what I said was simply an impression, and I could well have been mistaken.

2316 If this is the sole source, I would say that it is highly dubious.

2319 I was told a number of things about Millard, yes. I think I was told that Millard had visited—had had a friendy visit with Eisenschiml.

2320 Perhaps I did say that he had consulted with Eisenschiml. Yes, I expressed no surprise when you said there had been no consultation.

Gertz: (reading from page 1939 of testimony.)

2321 "There is obviously no copying of language, except, I think, I detected ten words that looked like direct copying, though they might well be verbal echoes."

2322 On page 1945 on direct examination you were asked: "Doctor, you mentioned a little while ago as you read over the 55 Quotes

'—there were a couple of instances here you thought Millard had copied. Can you lay your hands on those'"?

"and your answer:

'There were two'."

On page 1947 you were asked by Mr. Martineau to single out the particular passages you had in mind, and you answered,

2323 "And afterward Stanton swore under oath . . . that Abraham Lincoln had not been . . . then "Stanton testified under oath that Lincoln did not visit. . . ."

Samuels: That was Quote 10. There are similarities of language but not identities.

"In his Memoirs Grant skilfully slid over" . . . "Grant passed over". That is Quote number 4.

2324 "It is that sort of thing, and that is the only sort of thing that I saw, portions of a sentence, but I nowhere saw any extended copying."

Samuels: Those are not direct identities. The only one that struck me was the

"coarse and violent—"

2327 In Quote 35, that final sentence, "That close O'Beirne came to making the capture." vs. "That close O'Beirne came to getting his man."

2328 This is practically identical language except for the word "getting." and it is preceded by a direct Quote in identical language.

2329 There is no question about the identity.

2330 The source of this would have to be Eisenschiml because Millard had not seen the original papers.

I think Millard took that sentence from Eisenschiml. It seems to me probable in that case. And the quote is a certainty.

2331 That, I am sure is not in dispute.

I would have to forget everything I know about the habit of scholars to say this is significant of an intention to plagiarize.

That Millard used Eisenschiml for other portions I believe was apparent to me, but this is insignificant

2332 material. It is correct that I think Millard acknowledged far more indebtedness than I have testified to.

Gertz: On page 1492 of your direct examination, Mr. Martineau showed you Defendant's Exhibit #4 and then said:

"I guess you were referring to this"

and you answered:

2333 "Yes, this is the sort of research that would need to be done when you are working out a scholarly problem. Is there a unique source or is there a common source?"

2334 Samuels: I think I explained to what extent I relied on Exhibit 4. I did not rely on it.

Gertz: On page 1943 of your direct examination you said:

2335 ". . . The most important refutation, is the common source, and in going through this (referring to Exhibit 4) it supported what was basically my suspicion that there were common sources."

"I was struck again and again by the fact that adequately accounted for what, at the first blush, —seemed like borrowing."

2336 [Then I asked you:]

"In other words, the impression you got after looking at this Exhibit #4 . . . is that . . . Millard borrowed from the common source"

[and you answered:]

"That is true. That is true."

Samuels: I recall that, not specifically, but it has a familiar ring. You correctly summarize that it [the Exhibit #4] came as a kind of corroboration, but my opinion is not [based] on that exhibit.

2337 I cannot answer yes or no to your question whether I reached my conclusion on the assumption

that Millard and Eisenschiml used common sources. I reached it in a rather complex manner, but the question of common source was not controlling in my initial opinion.

2338 Although I am not an expert on the Lincoln or assassination literature, I know whether common sources were used by Eisenschiml and Millard, partly from my reading and from the vast amount of documentation in Eisenschiml's book, which convinced me that in it very little would emerge as his own contribution. Partly I knew it from Bryan's book and the many reviews.

2339 I did not rely on Benjamin Thomas or Monaghan. I consulted Thomas in order to acquaint myself

2340 more fully, with the state of Lincoln scholarship.

2341 Yes, I think Thomas referred to the new material in Eisenschiml's book. Other historians in their reviews spoke of new material, and Millard speaks of it and new discoveries. And so does Paul Angle. I don't think the publishers would have published it unless there was new material in it.

Mr. Gertz: Doesn't that mean that your statement earlier, that Eisenschiml derived his book from common sources is inaccurate?

Samuels: Oh, no. It is a blend of the old and the new.

2342 Quote 3

Mr. Gertz: Did Millard use the material in any way different from Eisenschiml?

2343 Samuels: The true nature of the parallel is that Millard used Eisenschiml as a historical source, so that a number of words will have to be identical. In

2344 that respect only, is there a similarity.

2347 Quote 7.

I think it probable that Millard borrowed the factual information from Eisenschiml.

2349 The literary handling of it is different.

2350 I would not call this detail colorful.

Quote 11

Gertz: At the time of your direct examination did you know that Millard had admitted that he

2351 had not [read] the Boston Sunday Post of June 11, 1915?

2353 I did not know.

In looking at the two Quotes #11, it could be that Millard derived it from Eisenschiml.

2354 As to language, there are fragments here, which would not be conclusive.

2355 There are some similarities of portions, yes.

"There is no record" —"we have no record". Then "How about the busy Major Eckert" vs "Now as to Eckert," no scholarly inference would really be justified.

2356 "Stood in the bathroom shaving", is different from "He was found in the bathroom shaving." That is more colorful than in the original.

2358 I believe that particular material is used differently from Eisenschiml.

2361 The main changes are the transformation of the language, the differences in style, the difference in purpose. • • •

Mr. Gertz: Q. Will you listen for a moment, Doctor? I dont' want a lecture on literary criticism. I want specific pointing out of the precise manner in which Millard has used the material in quote 11 as contrasted with the

2362 precise manner in which Eisenschiml has used the same material in quote 11.

A. I have tried to suggest —

Mr. Martineau: Off the record.

(Discussion off the record.)

The Witness: Well, you cannot dismember the literary process in a manner that your question implies. That is where my difficulty arises.

Mr. Gertz: Q. All right, you have answered it. You can't do it.

A. That is, you treat it as a chemical process. It is not.

Q. All right. Now, would you say the material in 11 is a colorful or interesting or important part of the Millard story?

A. That contains a number of conclusions. As to color I would say from the point of view of stylistic treatment it is not colorful. As to, what was the second, characterization —

Q. Interesting?

A. That it is interesting? Only in the context.

Q. Important?

A. From the point of view that I have shown that this has to be regarded, I would say no, it is not important. • • •

Quote 13

2363 I did not know at the time of my direct examination that Millard had admitted never having seen the records of the Metropolitan Police.

2364 If I had, it would not have changed my opinion.

Quotes 13, 14, 15.

As to whether Millard used the Parker material differently from Eisenschiml, the style is different. As to substance, the main items occur in both. The language

2365 is not colorful, the episode is interesting, but not im-
2366 portant in Millard's story.

As to Quote 14, I did not know during my direct examination that the incident of Parker being kicked appears only in Eisenschiml and Millard. If I had known, I would not have qualified my opinion, because the kick is a historical fact, whether any writer is entitled to take it, is another question.

2366-2367 In many cases, no, but in this case, it is fair use.

Quote 15

2374-2375 I did not know during my cross-examination that the only place where the full text of Mrs. Lincoln's letter appears is in Eisenschiml.

2377 It is hard to say whether it is unlikely that Millard would first have gone to Sandburg, and then to Eisenschiml to supply a few missing words.

Quote 16

2378 I did not know during my direct examination that Millard admitted that the only place where he saw the Forbes affidavit was in Eisenschiml. It would not have affected my judgment. Millard uses the material differently, first, in style. Millard says "all the accounts", Eisenschiml says "most authorities".

2380 As to the differences in substance, you are using that word in some sort of metaphysical sense.

Gertz: Can you come down to earth on Quote 16?

Samuels: No, you cannot. I can't do it as an expert.

2381 Gertz: A man who is telling the truth would find no difficulty in pointing out substantial difference. He has evaded that question every time it is put to him.

Quote 17

2382 You asked me to compare "the news-beat of the century" with "the great scoop of the century". They appear in the same context. One seems to echo the other, I would say.

2383 As to substance, they both contain substantially the same idea. Yes, they are similar in language.

2385-2386 The material is interesting, and a significant part of the episode.

Quote 22

2386-2387 I did not know at the time of my direct examination that Millard had been

2387 asked by Mr. Martineau

"Did you steal or pirate that from Eisenschiml?" and that he answered "I am rather afraid I did."

2388 That would not qualify my statement, because it seems to me his statement was uncalled for.

Gertz: In other words, even if he stated that he stole anything from Eisenschiml you think he ought not to have admitted it?

Samuels: He was not a lawyer, and all he was competent to talk about was the nature of his borrowing.

2389 Regarding Quote 22 I would not say that Millard and Eisenschiml make substantially the same use of the material. Millard is dramatizing the statement, and underscores the baffling element of it.

2391 You ask me to point out the differences between the uses made by the material in Quote 22 between the two authors other than stylistic.

2392 The facts are about the same. The use is different. Millard directs it toward confusion and bafflement.

2393 Eisenschiml was concerned with calling attention to a contradiction, showing that there were forces

2394 at work to alter the testimony.

2395 Millard's treatment of the material is colorful and interesting and important in that episode.

Quote 23

I did not know during my direct examination that Millard had admitted that he got the material about the doctoring of Fletcher's testimony from Why.

2397 I do not believe his admission would be evidence that he stole the material.

2398 All that appears clear from Millard's admission is that he got his data, read it, and based his story on it. There is a similarity in the phrase "Fletcher stated that he overheard"

2399 Millard and Eisenschiml both give the same thing, that people were saying. The quotations are not exact but fairly close. There is no question that Millard got the source of that quotation from Eisenschiml.

2400 There is a substantially different presentation. The difference is not material.

2401 I don't think this is a very colorful passage.

2402 It is not important in developing Millard's entire article.

Quote 24

I did not know at my direct examination that Millard admitted having gotten it from Eisenschiml

2403 It would not affect my original opinion.

2404 I did not know then that Millard admitted never

2405 having seen the police blotter. It would not have qualified my opinion. Within the context the material is interesting.

2406 As to detail it is important.

2407 I do not know if there is anything about Fletcher in Millard that is not derived from Eisenschiml.

Quote 26

(Samuels is asked to read the Gleason article.)

2409 I did not find in the article in my first reading the adjective "flatly";

2410 nor "flatly refused".

2411 The similarity of language in Millard and Eisenschiml [in using these words] would suggest to me preliminarily that Millard had access to Eisenschiml's book. He could not have gotten it from Gleason's article. It seems to me it is a verbal echo.

2412 (Witness is shown Plaintiff's Exhibit 30, three parallel columns — one the Gleason episode in Gleason's article, one in Eisenschiml, one in Millard.)

2412-2413 I would say that it is a possibility that Millard derived this from Eisenschiml, not from Gleason.

2414 There is a degree of probability that Millard derived it from Eisenschiml.

Quote 27

2417 I did not know at my direct examination that on direct examination Millard was asked "Will you tell whether you pirated No. 27 from Eisenschiml?" and he answered "Yes . . . that is the number of persons rushing to headquarters".

2418 Nor did I know that Millard admitted not having seen the blotter. Overall, it could not have changed my testimony; in detail, it could throw light on the character of Millard's indebtedness to Eisenschiml for the factual material.

2419 It would not indicate that he was indebted to him in other quotes as well. You might multiply these isolated passages to 77 or 107, several hundred of a thousand. I see no pattern of theft, but a pattern indicating that Millard is indebted to Eisenschiml for a considerable amount of material.

2420 This is not one of the more dramatic passages. I think the material is important as to what happened that night.

Quote 28

2423 I did not know at my direct examination that Mil-
2423 lard admitted not having seen the Macon Daily News of April 26, 1865 and that he got its sole knowledge from Eisenschiml's book.

2423-2424 It would not have changed my opinion.

2425 I would not consider the material colorful; it is significant within the episode.

Quote 29

2426 (Witness is asked to read Plaintiff's Exhibit 31.) (3 parallel columns, one giving Gobright's original story in excerpt, one Eisenschiml's and one Millard's version of it.)

2427 I find nothing in Column I about "Rushing out, he quickly wired his papers. From there Gobright hurried to Ford's Theatre." I find neither the language nor the thought.

2428 Yes, there is a similarity of thought [between Column I and II], and one could be a paraphrase of the other. In this instance I think it would be a probable inference that Millard got at least a part of this from Eisenschiml, yes.

2430 I could not cite this passage as one of the more picturesque elements

2431 in the article. Nor is it an important part.

Quotes 34 and 34A

I did not know when under direct examination that Millard admitted that "Quote 34 falls under the Eisenschiml credit."

2434 Nor did I know that Sandburg credits Eisenschiml in "The War Years" with the Parker material. Had

I known these two things, it would not have qualified my testimony.

2435 Quote 34 is one of Millard's more colorful treatments of the facts.

2436 It is important in the sense that any detail, if well used, is important. It helps make the article. 34-A is a detail that has a very real function

2437 within the structure of the narrative.

Quote 39

The significance of Millard quoting only Browning and Bates and in the same order as Eisenschiml is this: the source would be in Eisenschiml.

2438 That the two men are described in the same manner by Millard would either be an imitation of language, or because the material was similar. I do not know whether at that time Browning was a Senator from Illinois. I can make no deduction, whether his being Secretary of the Interior has anything to do with the quotation.

2439 As to regarding it as significant that Millard quotes nothing else from Browning and Bates, I think it would be a fair inference that Millard used Eisenschiml as a source for these quotations.

2439-2440 As to colorful language, I would regard it as a meaningless characterization. Both are interesting details.

Quote 40

There is a similarity and dissimilarity in language.

2441 The phrases "farm tavern", "the peach orchard", "a few sheds and barns" are identical, and I suppose the facts are identical.

I had not known when under direct examination that

no similar description exists. It would not have qualified my testimony.

2442 As to this material being colorful, Millard has tried to make it so, but these details are only fragments.

Quote 47

(Witness is asked to read Plaintiff's Exhibit 28) and look for finding anything that "going south one might find a boat to take one north."

2443 I find nothing that would indicate this.

If there is no such statement of fact I would be willing to accept it. It seems clearly here that the source of information is in Eisenschiml's book.

2444 It is Eisenschiml's deduction.

I would regard 47 as one of the details which has a part in the story, but not a key part.

Quote 48

When under my direct examination I had read that the source of this was the O'Beirne papers.

2445 Millard freely acknowledges that this is one of the many historical sources derived from Eisenschiml.

2446 Martineau: It is conceded that in the published story there is not any credit to Eisenschiml.

2450 I think it is reasonable to conclude that one of the historical sources to which Millard is indebted is Eisenschiml, and it is one of the important ones.

2451 Quote 49

Millard says "Jett was even used as a government witness." Eisenschiml says "Jett was even used as a witness for the government."

I would say the language is closely similar.

At that point it would be a fair inference that Millard took the language from Eisenschiml.

2452 Quote 64

I would say that 10:13 business would be interesting. "Colorful" would not be the word.

• • •

2453 I think it would be desirable if a language expert himself ought to be able to write with accuracy and clarity, but they don't always.

2454 As to mistakes in grammar and punctuation, I would say that errors one should try to avoid, but sometimes you make them or your editors or proofreaders.

As to my book "The Young Henry Adams" I hope I can write better than I did then.

2454 ff. (Questions and answers with respect to grammatical errors, the style, etc., of Samuel's book on Adams).

• • •

2478 *Redirect Examination of Mr. Samuels*
2479 *by Mr. Martineau.*

Assuming that in some instances Millard did go to the common sources and in others he admitted borrowing factual material and language from Eisenschiml, I would still say that Millard's work could be an original work.

It could be and it is.

The material borrowed is a relatively small proportion of the total article and of the books from which they
2480 were taken: hence the originality would stand.

Out of the 25,000 words, more or less, the borrowed material would not exceed some 5,000 words, and the greater part of the language and of the data used, the very greater part, certainly of the language, is Millard's own.

2482 The alleged borrowed material does not bear materially upon the originality of the whole piece.

2484 In the medium in which the article was published, it is a very rare thing to come upon acknowledgments of indebtedness.

2518 Martineau makes a statement.

As to Defendant's Exhibit 4 I suggest that I physically cross off the arguments on the bottom, because all it was intended to be was just a source book, an accurate copy of these authorities, whether they be in point or not.

Then I find, that this researcher, by some misunderstanding, did not include everything. For example,
2519 she did not include materials from some of the alleged differences that Eisenshciml pointed out in his affidavit, that thing about the gimlet hole for example, and we are working on that now. • • •

2520 Mr. Gertz: Without, of course, waiving any of our objections.

Mr. Martineau: That is right. In other words, whether they be material or not is for your Honor to decide, but they are, as far as the evidentiary standpoint is concerned, matters within the public domain and can be checked by everybody, can't they, so I think we understand each other on that.

Mr. Gertz: In other words, the plaintiff is making no admission as to the meaning or arguments to be derived from any of those quotes.

Mr. Martineau: That is right.

Mr. Gertz: Or whether they have any evidentiary value or not.

Mr. Martineau: Right.

Mr. Gertz: And as a matter of fact, we are formally stating that we believe that none of them are of any materiality or competent to prove anything in issue here,

but we nonetheless, for whatever it is worth, will permit counsel to add those pages. * * *

2525 Coronet article received in evidence as Def's. Ex. 2 of 5-27-55, subject to objection.

2526 Advocate article recived in evidence as Def's Ex. 3 of 5-27-55, subject to objection.

2534 Proofs closed.

2538 Stipulation as to Civil War Round Table received as Def's Ex. 1 of 9-23-55. * * *

2538 Mr. Martineau: Before I forget it, may I make this statement, Elmer. I don't remember the number, if it had a number, a separate number, of Dr. Eisen-
2539 schiml's affidavit in support of the motion for summary judgment.

Mr. Gertz: That was Exhibit 7, Plaintiff's Exhibit 7.

Mr. Martineau: Exhibit 7?

Mr. Gertz: Yes.

Mr. Martineau: Now, my recollection was that when you offered that in evidence I made no objection to it.

Mr. Gertz: That is right.

Mr. Martineau: I would have sworn and still would swear except that I don't concede the truth of what is in in, but I have no objections—

Mr. Gertz: Here is what you said, here is the sequence. At the time it was offered you said "No objection." No objection was received.

At a subsequent hearing, or maybe later in the same hearing, you made some remark to the effect—

Mr. Martineau: A qualification to that effect.

Mr. Gertz: Yes, but at the time it was offered you made no objection.

Mr. Martineau: That is my memory of it. It was agreed then, I think the upshot of it was, that I had no objection

to its admission in evidence, but I didn't want to be
2540 put in the position of admitting the truth of all the statements of fact, for one reason—

Mr. Gertz: You subsequently said that, but at the time it was offered you made no objection.

Mr. Martineau: Yes, just as long as the record is straight on the fact.

Mr. Gertz: Either at the same hearing or subsequently but not at the time it was offered.

Mr. Martineau: That is right. * * *

2550 End.

PLAINTIFF'S EXHIBIT 6

REQUEST FOR ADMISSIONS

The plaintiff, Otto Eisenschiml, requests the defendant, Fawcett Publications, Inc., a Delaware corporation, within ten (10) days after the service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. Exhibit "A", attached to affidavit of plaintiff in support of his motion for summary judgment, heretofore filed herein, and by this reference made a part hereof, is a true and correct photostatic copy of pages 73 to 77, both inclusive, of a book-length article, entitled "The Devil's Errand Boy," by J. J. Millard, which appeared in the July, 1947 issue of defendant's magazine "True."

2. Exhibit "B", attached to the said affidavit, and by this reference made a part hereof, is a true and correct copy of the passages on pages 122 to 124 of a book by Dr. Paul M. Angle, entitled "A Shelf of Lincoln Books," relating to plaintiff's book, "Why Was Lincoln Murdered?"

3. Exhibit "C", attached to this said affidavit, and by this reference made a part hereof, correctly sets forth in the first column thereof, under the words "True Magazine," passages from the book-length feature by Joseph Millard, which appeared in the February, 1953 issue of defendant's magazine "True," and correctly sets forth in the second column thereof, under the words "Otto Eisenschiml," passages from plaintiff's books, "Why Was Lincoln Murdered?" and "In the Shadow of Lincoln's Death."

4. The document annexed to paragraph 24, attached to the said affidavit, and by this reference made a part hereof, is a true and correct photostatic copy of a genuine letter from Fawcett Publications, Inc., to Mr. Charles E. Mason, 224 Washington Street, Waukegan, Illinois, dated February 27, 1953, which letter is signed by Ralph Daigh, Vice-president and Editorial Director of defendant.

5. Paragraphs Nos. 1 to 27, both inclusive, of the said affidavit, and by this reference made a part hereof, correctly and accurately set forth the facts that they purport to set forth.

(If, for any legal reason, defendant is unwilling to admit the correctness and accuracy of any of the said paragraphs, it is requested to admit the correctness and accuracy of the other of such paragraphs or portions thereof.)

* * *

PLAINTIFF'S EXHIBIT 8

INTERROGATORIES ADDRESSED TO DEFENDANT

Plaintiff, Otto Eisenschiml, addresses the following interrogatories to the defendant, Fawcett Publications, Inc., a Delaware corporation, to be answered by its proper officer,

under oath, pursuant to Rule 33 of the Rules of Civil Procedure:

1. As to *each* of the sixty-six (66) items included in column 1 of Exhibit "C", (headed "True Magazine"), attached to plaintiff's affidavit in support of motion for summary judgment, heretofore filed herein, and by this reference made a part hereof, answer the following interrogatories:

(a) What is the source of the said item—name of book, magazine or other source; author, editor, compiler or other identification; publisher; date of publication; page or pages where item appears?

(b) Where and when did you or your author, Joseph Millard, first see item or its source?

2. As to *each* of the thirty-five (35) items included in paragraph 19 of plaintiff's affidavit in support of motion for summary judgment, heretofore filed herein, and by this reference made a part hereof, answer the following interrogatories:

(a) What is the source of the said item—name of book, magazine or other source; author, editor, compiler or other identification; publisher; date of publication; page or pages where item appears?

(b) Where and when did you or your author, Joseph Millard, first see item or its source?

3. As to *each* of the fifteen (15) items included in paragraph 20 of plaintiff's affidavit in support of motion for summary judgment, heretofore filed herein, and by this reference made a part hereof, answer the following interrogatories:

(a) What is the source of the said item—name of book, magazine or other source; author, editor, compiler or other identification; publisher; date of publication; page or pages where item appears?

(b) Where and when did you or your author, Joseph Millard, first see item or its source?

4. If you contend that any of the items included in paragraph 21 of the said affidavit, and by this reference made a part hereof, are in fact well founded and true, and not historical errors as contended by the plaintiff, then, as to *each* of the said items, answer the following interrogatories:

(a) What is the source of the said item—name of book, magazine or other source; author, editor, compiler or other identification; publisher; date of publication; page or pages where item appears?

(b) Where and when did you or your author, Joseph Millard, first see item or its source?

5. As to specifically which "sensational discoveries" of plaintiff do you or your author, Joseph Millard, have reference in the quotation from the article in the July, 1947, issue of your magazine, "True", set forth in paragraph 11 and Exhibit "A" of said affidavit?

6. As to the February, 1953, issue of your magazine, "True,"

(a) What was the circulation or sales thereof?

(b) What were the gross receipts from such circulation or sales?

(c) What were the gross receipts from advertising revenue thereof?

(d) What were the total gross receipts thereof from any source?

• • •

PLAINTIFF'S EXHIBIT 9

ADDITIONAL REQUEST FOR ADMISSIONS

The plaintiff, Otto Eisenschiml, requests the defendant, Fawcett Publications, Inc., a Delaware corporation, within ten (10) days after the service of this request to make

the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1 (a). The factual material summarized in sub-paragraph (a) to (ii), both inclusive, of paragraph 19 of the affidavit of plaintiff in support of his motion for summary judgment, heretofore filed herein, and by this reference made a part hereof, appears in either or both of plaintiff's two books, "Why Was Lincoln Murdered?" and "In the Shadow of Lincoln's Death", and also appears in defendant's said article in the February, 1953 issue of its magazine "True".

(b) The said factual material appeared or was published for the first time in either or both of plaintiff's two said books.

(If, for any legal reason, defendant is unwilling to admit the correctness and accuracy of any of the said sub-paragraphs, it is requested to admit the correctness and accuracy of the other of such sub-paragraphs or portions thereof.)

2. (a) The deductions, conclusions and speculations summarized in sub-paragraphs (a) to (o), both inclusive, of paragraph 20 of plaintiff's said affidavit, and by this reference made a part hereof, appear in either or both of plaintiff's two said books and also in defendant's said article.

(b) The said deductions, conclusions and speculations appeared or were published for the first time in either or both of plaintiff's two said books.

(If, for any legal reason, defendant is unwilling to admit the correctness and accuracy of any of the said sub-paragraphs, it is requested to admit the correctness and accuracy of the other of such sub-paragraphs or portions thereof.)

3. Defendant's author, Joseph Millard, made the following historical errors in defendant's said article:

(a) as to where Booth got the wood with which the Presidential box was braced;

(b) as to Sergeant Dye's testimony;

(c) as to what could be seen when looking through the gimlet hole in the Presidential box;

(d) as to the certainty of the identification of Booth;

(e) as to why Paine needed a guide;

(f) as to the "second rider;"

(g) as to whether the soldiers were sent to help Booth escape;

(h) as to the "little bells;"

(i) as to the "gin-soaked prostitute."

(If, for any legal reason, defendant is unwilling to admit the correctness and accuracy of any of the said sub-paragraphs, it is requested to admit the correctness and accuracy of the other of such sub-paragraphs or portions thereof.)

4. Defendant's author, Joseph Millard, never had the O'Beirne Papers in his possession and never examined them.

* * *

PLAINTIFF'S EXHIBIT 10

ADDITIONAL REQUEST FOR ADMISSIONS

The plaintiff, Otto Eisenschiml, requests the defendant, Fawcett Publications, Inc., a Delaware corporation, within ten (10) days after the service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. (a) Otto Eisenschiml, the plaintiff herein, is a citizen of the United States. (b) He acquired such

citizenship at birth. (c) He was a citizen at the respective times of the copyright of his two books, ***Why Was Lincoln Murdered?*** and ***In the Shadow of Lincoln's Death,*** and (d) continuously since then. (e) The records in the Passport Office of the Department of State of the United States state that he acquired American citizenship at birth under the provisions of Section 1993 of the Revised Statutes of the United States, as originally enacted.

2. (a) Joseph Millard, the author of "America's Greatest Unsolved Murder," voluntarily destroyed his source notes prior to the publication of his article. (b) His original source notes are not now in existence or available.

3. (a) The net paid circulation of "True" for the January, 1953, issue, was 1,824,292. (b) The net paid circulation thereof for the March, 1953, issue was 1,709,805. (c) The average net paid circulation thereof for the six-month period ending June 30, 1953, was 1,739,088. (d) The average net paid circulation thereof for the six-month period ending December 31, 1953, was 1,789,970.

4. (a) Copies of the February, 1953, issue of "True" were sold or circulated by the defendant throughout the year 1953 and (b) throughout the first eight months of the year, 1954. (c) Copies of the said issue were sold or circulated by the defendant after its receipt of the letter to it from Charles E. Mason, dated February 19, 1953 (which letter is a part of par. 24 of plaintiff's affidavit in support of his motion for summary judgment). (d) Copies thereof were sold or circulated by the defendant after its receipt of a letter from Elmer Gertz, attorney for the plaintiff, dated March 12, 1953, which letter complained of alleged copyright infringements by defendant. (e) Copies thereof were sold or circulated

by the defendant after the present suit was filed. (f) The defendant has never made any effort to stop the sale or circulation of the February, 1953, issue of "True" by any of its agents, representatives or distributors or newsstands or magazine dealers generally. (g) The said issue has been sold by distributors, newsstands, magazine dealers and others since the defendant's receipt of the said Charles E. Mason letter dated February 19, 1953, the receipt of the said Elmer Gertz letter dated March 12, 1953, and the filing of the instant suit.

5. (a) Joseph Millard never submitted to the defendant his sources or authorities for the said article or any authorizations or permissions to use any material therein; and (b) defendant never asked him for such sources, authorities, authorizations or permissions. (c) Prior to the publication of the said article, the defendant made no effort to check said article for possible copyright infringements.

6. (a) The defendant never submitted the said article to historians or authorities on the Lincoln assassination prior to its publication. (b) A member of the editorial staff of the defendant suggested in writing that the defendant submit said article to a historian or authority on the Lincoln assassination prior to its publication. (c) The said suggestion was read by Ralph L. Daigh prior to the publication of the said article, and (d) ignored by him.

7. (a) Neither Joseph Millard, nor the defendant, nor anyone for them, or either of them, ever asked the plaintiff, nor any one for him, for permission to use any of the language or material of plaintiff's two said books in connection with the said article, and (b) no permission for such use was ever given by plaintiff, or any one for him, to them or any of them in connection with the said article.

8. (a) After February 11, 1953, the defendant advertised or publicized the said article by Millard, and (b) did so after March 12, 1953, and (c) did so after the filing of this suit. (d) The defendant advertised or publicized the said article on the cover of the January, 1954, issue of "True."

9. Joseph Millard read the plaintiff's two said books before writing his said article, "America's Greatest Unsolved Murder."

PLAINTIFF'S EXHIBIT 17 *ID*

(Seal)

LETTERHEAD OF
DEPARTMENT OF STATE
Washington

Oct 2 1953

In reply refer to
C130 - Eisenchiml, Otto
Mr. Otto Eisenschiml,
Care of Cunilate Division,
Scientific Oil Compounding Company, Inc.,
1637-55 South Kilbourn Avenue,
Chicago 23, Illinois.

My dear Mr. Eisenschiml:

The Department has received your letter of September 17, 1953 from which it appears that you desire to obtain a statement establishing your American citizenship for use in connection with your re-entry into the United States from Canada.

Your American citizenship is of record in the Department in the form of the applications upon which several American passports were issued during the years 1925 to 1935 and which show that you were born at Vienna, Austria on June 16, 1880; that you emigrated to the

United States in 1901 and that your father, Alexander Eisenschiml, was naturalized as a citizen of the United States before the District Court of the United States for the Fourth Judicial District at Silver City, Nevada on October 5, 1869.

You are deemed to have acquired American citizenship at birth under the provisions of Section 1993 of the Revised Statutes of the United States as originally enacted which is quoted in the enclosed circular.

Sincerely yours,

/s/ R. B. Shipley,
R. B. Shipley,
Director, Passport Office

Enclosure:
Circular.

PLAINTIFF'S EXHIBIT 20

OVER-ALL PLAGIARISM OF MILLARD'S STORY

Millard's plagiarisms are not confined to pirating my material, my language, my surmises and inferences, but in addition comprise the entire buildup and the main thesis of my books, especially that of "Why Was Lincoln Murdered?"

"Why Was Lincoln Murdered?" is essentially different from all previous accounts of Lincoln's assassination. It reopens the supposedly closed chapter of Lincoln's death by disclosing many news facts, discovered by myself, and, what is equally important, it dovetails them with known facts into a new and consistent pattern, which form the main thesis—that the crime was not, as heretofore assumed, the deed of a half-crazed actor acting on his own behalf, but the result of a conspiracy, in which high Washington officials were involved, possibly Secretary of War Stanton included. The book also points out many hereto-

fore overlooked mysteries, some of which remain unexplained.

Prior to the publication of "Why Was Lincoln Murdered?" no suspicion along these lines had been voiced by any historical writer. This thesis was then supplemented by my second book, "In The Shadow of Lincoln's Death."

Millard pirated my essential new material, together with my language, speculations and inferences, and with the mysteries which still await solution. He followed closely the buildup of my story, thereby committing plagiarism both on a wholesale and retail scale.

Even had he not copied my new facts, my language, my surmises and my interpretations, his article still would constitute plagiarism because of the way in which the pattern of his story parallels mine. In fact, it is virtually a condensation of my initial chapters.

• • •

Here is an outline of the principal chapters of "Why Was Lincoln Murdered?" which Millard plagiarized, together with his parallelisms. Also note how he carries his story along in line with my own buildup.

CHAPTER III

This chapter recites the career of an incompetent and dissolute policeman named John F. Parker, who was Lincoln's bodyguard on the fatal night, and how he happened to be appointed through a letter written by Mrs. Lincoln to a provost marshal named O'Beirne. This story, taken partly from the dust-covered archives of the Washington Police Department, and partly from the private papers of O'Beirne, had never been published before. Millard's sequence of incidents is somewhat different from mine, but his buildup closely parallels mine.

Millard begins his story with identically the same premature notices of Lincoln's death, as I did at the beginning of my book "In The Shadow of Lincoln's Death," then copies Mrs. Lincoln's letter to O'Beirne verbatim. His account of Parker's career is almost verbatim repetition of my own, although he scatters it throughout his article.

CHAPTER IV

Shows that the accepted version of what happened in the President's box at Ford's Theatre, prior to the assassination, was wrong. I proved this through a heretofore unpublished statement of Lincoln's valet, Charles Forbes, and one by a journalist named Hanscom, also heretofore unknown. I further pointed out the variations and contradictions of two different statements made by three witnesses—Miss Harris, Major Rathbone and Captain McGowan. Some of these statements had been unknown, others had not been properly evaluated. My evaluation led to the suspicion that these witnesses had been influenced by the War Department to omit certain portions of their original statements.

Millard calmly appropriated the Forbes statement verbatim; in addition he copied the statements of Miss Harris, and Major Rathbone, which had admittedly been unknown to him, and furthermore, pirated my surmises and inferences from the statements of all four of the above persons.

CHAPTER V

Here I investigated Stanton's refusal to allow Major Eckert to accompany Lincoln to the theatre, and uncovered the falsity of the statements by Stanton and Eckert as to what they intend to do that night. I further pointed out Stanton's perjury about Lincoln's last visit to the

War Department. All these incidents, some of which had lain deeply buried in Congressional records or old newspapers, increased my growing suspicion of Stanton's complicity.

Millard followed me here without shame. He repeated my proof of Stanton's and Eckert's lies, also what they really did that night, and copied my implication of Stanton's complicity by printing a picture of Stanton with this caption: "Why did he refuse Lincoln the guard he asked for?"

CHAPTER VI

One of my main points is that the War Department had known the identity of the conspirators for several weeks prior to the assassination, but had taken no action against them, had not even kept them under surveillance. My proof was a letter, known as the "Sam letter," which was generally accepted as the means which identified Sam Arnold, one of the conspirators, and led to his arrest. I showed that this assumption was wrong.

Millard repeats my account, including my discoveries and inferences, with dog-like fidelity.

CHAPTER VII

In this chapter I showed that Grant's version of why he stood up Lincoln that night was a fabrication, because according to a time-table, which it took one of my investigators about nine months to find, he could have reached his children by an early morning train almost as quickly as by the night train he took. I also doubted his anxiety to see his children, from some of whom he had not been away very long. I further pointed to the fact that had Grant been present in the box, Booth's plot could not have been carried out.

Millard copied everything in this chapter, including the train schedules, also my suspicion that his anxiety to see his children probably was exaggerated.

CHAPTER VIII

I proved for the first time that the news of the tragedy and the name of the assassin were *wilfully* withheld from the press until the time for the first morning editions had passed; and that, wherever this was impossible, the papers were kept from printing the truth. This includes the strange behavior of L. A. Gobright, the Washington agent of the Associated Press.

I further showed that the interruption of the wire service at the critical hours was an inside job, and why no efforts were made to investigate it.

I further showed that the Southern papers were very tardily advised of the news, or were not allowed to print it at once.

The implication of these facts is that Booth was to be given time to get safely beyond reach of successful pursuit.

Millard virtually paralleled this chapter with all of its inferences. He cited all Southern papers which I had cited, although he admitted that he himself had seen none of them, and presented none which he had found himself.

CHAPTER IX

Here I showed that the War Department sent troops out to patrol every road out of Washington, except the one which Booth was most likely to take, and did take.

Millard practically pirated this chapter in toto.

CHAPTERS X and XI

These are the chapters showing the strange manner in which the report of the liveryman John Fletcher was

ignored; how sound plans for the pursuit of Booth were frustrated by the War Department, and how the official transcript of Fletcher's testimony, sanctioned by the War Department, was deliberately mutilated, in order to suppress the tell-tale parts of Fletcher's testimony.

Here again Millard parroted my story, and, after pirating my findings in Washington archives, re-voiced my suspicions, inferences and surmises.

CHAPTERS XII and XIII

Relates how Major O'Beirne almost caught Booth, but was called back by Stanton at the critical moment.

Again Millard picked up my idea and told the same story, with the same inferences.

CHAPTERS XIV and XV

This chapter carries to the final cornering of Booth, and then deals with the alleged plots against other high government officials. It also shows that Booth deliberately left behind clues to show where he intended to go, and I interpreted this as a game of a fox with the hounds. The chapter also shows that the alleged attempts against the other government officials with the exception of Seward, were faked. Millard copied my story.

CHAPTER XVI

I found that to Mrs. Surratt, the only woman prisoner, a promise of clemency was held out to keep her from talking.

Millard, without any other source but myself, copied my statement that a promise of clemency was held out to Mrs. Surratt.

These are some of the main points which demonstrate that the whole construction of Millard's article is a plagiarized copy of "Why Was Lincoln Murdered?"

Other plagiarized parts of his article also were taken from "In The Shadow of Lincoln's Death," but have less bearing on its general structure.

• • •

The following is a short summary of some of the newly discovered facts set forth in my two books, and appropriated by Millard.

A letter by Mrs. Lincoln asking for appointment of John F. Parker.	Copied verbatim by Millard.
The strange and heretofore unknown career of John F. Parker.	Copied almost verbatim by Millard.
Premature publications of Lincoln's death.	Copied almost verbatim by Millard.
Discovery of a timetable, showing that Grant's excuse for leaving Washington was spurious.	Copied almost verbatim by Millard.
Discovery that Stanton and Eckert lied about their prospective activities that night.	Copied almost verbatim by Millard.
Discovery of an affidavit by Forbes that he was in Lincoln's box that night.	Copied verbatim by Millard.
Discovery that the editor Hanscom delivered a letter to Forbes in the box.	Copied almost verbatim by Millard.

Discovery that Miss Harris, Major Rathbone and Captain McGowan later changed their eye-witness accounts, and the probable reason—a command from higher-ups.	Copied almost verbatim b Millard.
The unexplained failure to secure the testimony of Parker, Forbes and Hanscom.	Copied.
The disclosure that Pitman's official record of the trial was deliberately falsified.	Copied.
Discovery of an important police blotter in Washington.	Partly copied.
Discovery that intelligent pursuit of Booth was discouraged, or stopped:	Copied.
Through retention of Captain Gleason.	Copied.
Through wilful delay of sending out news.	Copied.
Through delay in giving out the name of the assassin.	Copied.
Through an apparent influencing of the agent of the Associated Press.	Copied.

Through sending troops in pursuit where Booth was most unlikely to go.	Copied.
The strange failure to investigate a two-hour interruption of the wire service.	Copied.
Discovery of a diary kept by one of the pursuers.	Copied verbatim.
Discovery of Baker's intention to find a substitute for Booth.	Copied verbatim.
Discovery by authoritative opinions on the illegality of the conspiracy trial.	Copied verbatim.
A description of the Surratt farm.	Copied almost verbatim.
The fact that a promise for clemency was held out to Mrs. Surratt.	Copied.
The fact that Baker sent a telegram to the Dry Tortugas.	Copied.
The fact that the ads in the Washington Evening Star printed Lincoln's name in smaller type than Grant's.	Copied.
Interpretation of the strange fact of Stanton's refusal to let Eckert protect Lincoln.	Copied.

The strange fact of Stanton's perjury about Lincoln's last visit to the War Department.	Copied.

Among the speculations offered by me and copied by Millard are:

That Grant was not overly anxious to see his children and why.	Copied almost verbatim.
The inexplicable fact that Forbes never was questioned.	Copied.
A new interpretation of the message Booth gave to Lloyd.	Copied.
The fact that Parker was kept on the police force as long as Stanton remained Secretary.	Copied.
A new explanation for the premature arrests of Arnold and O'Laughlin.	Copied.
Why three Confederate soldiers, as well as Cox and Jones, all of whom had aided Booth, remained unpunished.	Copied.
The odd surprise of a dying man when he hears his name spoken.	Copied almost verbatim.

My speculation that Lincoln was shot at 10:13 PM.	Copied.
My conclusion that the conspirators left tell-tale clues behind them.	Copied almost verbatim.
That the route the assassin took was the only logical route he could have taken.	Copied.
That Fletcher's testimony had never been investigated and what a close investigation indicated.	Copied.
My surmise that Stanton hated Lincoln and that he and the Radicals stood to profit by his death.	Copied.

This last speculation is the underlying thesis of my two books, particularly of *"Why Was Lincoln Murdered?"*. It was novel and bold in conception, but sustained by the foregoing facts and surmises. In appropriating my thesis, Millard practically appropriated my books. Even admitting that he might have looked up some of my references, thereby avoiding infringement of copyrights, he stands guilty of weaving all of my new facts and speculations into a story which closely parellels mine.

To fill out his story, he used standard material, which has been written up many times, but in which no writer, previous to myself, saw an unsolved mystery. It is safe to say that without my new material and its interpretations, his story would have lost its punch, and would not have been accepted.

According to Daigh's testimony, "An unsolved murder has better than average salability."

These are some of the main points which demonstrate that the whole construction of Millard's article is a plagiarized copy of "*Why Was Lincoln Murdered?*" (Other plagiarized parts of his article also were taken from *In The Shadow of Lincoln's Death,* but have less bearing on its general structure.)

My two books were the outcome of about 18 years of intense research, undertaken with much labor and at the expense of thousands of dollars. I was the one who discovered in the Archives of the Provost-Marshall's office in Washington the file containing the original documents relating to the assassination, none of which had been known to exist prior to my discovery. I received permission from the then Secretary of War Dern, to study and photostat them. With the help of two stenographers I copied the essential portions of these documents, assorted them, and suggested precautions against future thefts.

For many years I engaged a secretary for the single purpose of carrying on a wide correspondence in search of original material, and for over a year I hired three assistants to help her. In addition, I had several investigators working for me on special missions, in Washington, D.C., Macon, Ga., Berkeley, Cal., Burlington, Vt., and other places. I had to take many trips, and spent a great deal of money in buying rare books and manuscripts, which I otherwise would not have been allowed to use. The O'Beirne papers alone cost me $850.00. I estimate that my cash expenses, *aside from the acquisition of books and manuscripts,* amounted to about $16,000.00.

The manual labor of absorbing, co-ordinating and assorting my material was considerable, and the essential thesis was not developed without a great mental strain.

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In view of all these facts and considerations, I believe that I am entitled to full damages in accordance with the law.

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PLAINTIFF'S EXHIBIT 21.

LIBRARY OF CONGRESS

Copyright Office Of The United States Of America
Washington

Certificate Of Copyright Registration

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Act respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Book named herein have been deposited in this Office under the provisions of the Act of 1909, together with the Affidavit prescribed in section 16 thereof; and that registration of a claim to copyright for the first term of 28 years from the date of publication of said book has been duly made in the name of [over]

(Reverse Side)

Otto Eisenschiml
Chicago, Ill.

Title of book: Why was Lincoln Murdered? By Otto Eisenschiml, of United States, with Illustrations.

Date of publication Mar. 26, 1937.

Copies received Mar. 27, 1937.

Affidavit received Mar. 27, 1937.

Entry: Class A, No. 104467.

(Seal)

C. L. Bowie
Register of Copyrights.

PLAINTIFF'S EXHIBIT 22.

Additional Certificate (17 U.S.C. 215)

Class A No. 144677

COPYRIGHT OFFICE
Of The United States Of America
The Library Of Congress :: Washington

CERTIFICATE OF COPYRIGHT REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Act respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that TWO copies of the BOOK named herein have been deposited in this Office under the provisions of the Act of 1909, together with the AFFIDAVIT prescribed in section 16 thereof; and that registration of a claim to copyright for the first term of twenty-eight years for said book has been duly made in the name of

Wilfred Funk, Inc.,
386 Fourth Ave.,
New York, N.Y.

Title: In the Shadow of Lincoln's Death.
By Otto Eisenschiml, of United States.

New York
Wilfred Funk, Inc.
1940

Printed or produced by Cornwall Press
Cornwall, N. Y.

Date of publication in the United States Sept. 24, 1940
Affidavit received Sept. 28, 1940
Copies received Sept. 26, 1940
(Seal) Arthur Eiler
Register of Copyrights

PLAINTIFF'S EXHIBIT 23.

Assignment of Copyright

WILFRED FUNK, INC.
PUBLISHERS

September 23, 1942

Library of Congress
Copyright Office
Washington, D.C.

Dear Sirs:

For consideration received, Wilfred Funk, Incorporated desires to assign to Otto Eisenschiml the copyright taken in the name of Wilfred Funk, Incorporated to the book, IN THE SHADOW OF LINCOLN'S DEATH, by Otto Eisenschiml.

We enclose check for $2.00 as fee for this assignment.

Very truly yours,
Wilfred Funk, Inc.
/s/ Douglas E. Lurton
Douglas E. Lurton
Vice President

DEL:RL
ENC.(1)
(Seal)

A

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA

Library Of Congress—Washington

The foregoing assignment of copyright, dated September 23, 1942, and received for record in the Copyright Office on September 24, 1942, has been recorded in the

Copyright Office, book 492, page 112, in conformity with the laws of the United States respecting copyrights.

In Witness Whereof, the seal of this Office has been hereto affixed this second day of October, 1942.

Richard C. De Wolf
Acting Assistant Register of Copyrights.

(Seal)

The Act of March 4, 1909, sec. 44, provides: "That every assignment of copyright shall be recorded in the Copyright Office within Three Calendar Months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded."

PLAINTIFF'S EXHIBIT 24.

March 12, 1953

AIR MAIL REGISTERED
Return Receipt Requested

Mr. Ralph Daigh
Vice President and Editorial Director
Fawcett Publications, Inc.
67 West 44th Street
New York 18, N.Y.

Dear Mr. Daigh:

I am the attorney for Dr. Otto Eisenschiml, the author of *Why Was Lincoln Murdered?*, *In The Shadow Of Lincoln's Death*, and other writings, chiefly in the field of Civil War Literature. I happen also to be a student of Civil War literature myself, and have personal knowledge of the various matters mentioned hereinafter in this letter.

Immediately following the publication in the February 1953 issue of your magazine True, of the book-length feature, 'America's Greatest Unsolved Murder' by Joseph Millard, Dr. Eisenschiml began receiving letters and calls from friends and acquaintances, congratulating him upon the publication of the article, and inquiring as to why he used a pseudonym! Everyone assumed, as a matter of course, that the article was by Dr. Eisenschiml, because it was largely a paraphrase of the material which first appeared in his various writings on the assassination of Lincoln, and because much of the language was remarkably similar to that employed by him. Dr. Eisenschiml then read the article himself and was shocked by what he found. Thereupon he turned the matter over to me for legal attention.

I have delayed communicating with you until I could personally, as well as in association with Dr. Eisenschiml, make a complete checkup of the article in order to determine the full extent of the violations of his copyrights and plagiarisms of his writings. I have a long list, running into pages, of the most obvious and tell-tale copying by Mr. Millard from Dr. Eisenschiml's works. It is inconceivable that Mr. Millard could have derived his material from sources other than Dr. Eisenschiml's writings. Basically, and in details, the contents of the article, its substance, style and language, are derived from Dr. Eisenschiml's well-known writings.

Dr. Eisenschiml established a world-wide reputation as a student of the subject, because of the originality of his research, findings and speculations. Mr. Millard has simply helped himself to what belongs to Dr. Eisenschiml, who holds the copyrights in the books mentioned earlier in this letter.

The article refrains from mentioning Dr. Eisenschiml's name; it tries to conceal the borrowed sources, sometimes in the most clumsy fashion. Dr. Eisenschiml never gave permission to Mr. Millard for the use of his material and language.

This is so flagrant a case of violation of copyrights and plagiarism that we must insist upon full satisfaction. We shall expect to hear from you within the next very few days.

Very truly yours,
Elmer Gertz

EG:je

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PLAINTIFF'S EXHIBIT 27

XI / W 435 (PMG B) 1865 (Inked in margin)
Whig Press, Middletown N.Y.
Wednesday, April 19th, 1865.

AN IMPORTANT INQUIRY

Was the assassination of President Lincoln the result of a diabolical plot known to many in the loyal States? etc.

Rev. A. Seward (Inked in margin)

PLAINTIFF'S EXHIBIT 27-A.

Article from the WHIG PRESS, Middletown, N.Y.
Wednesday, April 19th. 1865.

An Important Inquiry.

Was the assassination of President Lincoln the result of a diabolical plot known to many in the loyal States?

The writer of this on last Friday, [April 14] at half past 2 o'clock, was informed that the President was shot, and it was currently so reported in the Village of Pine

Bush, in the town of Crawford, before 12 o'clock, M, of that day. Where did this report come from? Was it predicated upon a knowledge of what was to be done? Did some of the sons of Belial, alias the Sons of Liberty, let the matter out rather prematurely? Does it not evidence a wide-spread conspiracy with men at the North implicated therein? Was there not a deep and devilish meaning to the asseverations of some men among us, that Mr. Lincoln would never be President of the whole United States? And is not the Copperhead press, which has assailed our late President with an unfailing stream of malignant falsehood and defamation, as a tryant, imbecile and usurper—in fact, educated their readers to a malignant hatred of him—in some measure responsible for the deeds of their pupils?

PLAINTIFF'S EXHIBIT 29.

KIRKWOOD HOUSE,

SPRAGUE & CO.

Washington, D. C. July 20th 1865

Majr Jas. R. Osborne
Provost Marshall of the
District of Columbia
Dear Sir

Having on or about the
15th of April given information to the
Detectives then on duty guarding Mr
Johnsons room, of the suspicious
character in Room 126 of the Hotel
which on being searched proved to be

PLAINTIFF'S EXHIBIT 30.

The Gleason Story

Compare language in the original, Millard's version and mine.

On item 26, Millard's language again is suspiciously like mine, and quite different from that in the article which he claims was his source. (This also was my source, as given on footnotes in *Why*, page 114, and page 132.)

Article in Magazine of History	*Millard*	*Why*
It took a long time to reach General Augur's . . . I went . . . into a small room where several officers were, . . . told them all I knew . . . and . . . asked for a cavalry squad to go with me . . . But they thought I could be of more assistance in Washington . . .	At about that time Gleason burst into *Augur's headquarters begging* for a cavalry troop . . .	It could not have been much later when . . . Gleason put in an appearance at Augur's office . . . *He begged* to be given a mounted squad . . .
Sometime toward morning I was allowed to go back to my room . . .	Gleason *was flatly refused* . . . he was confined to Augur's headquarters the the remainder of the night . . .	But he . . . *was flatly refused,* . . . he was kept idling at headquarters until morning . . .

Note in particular the expression *"he was flatly refused"*, which did not appear in Gleason's article, but did appear in mine and Millard's. No unbiased critic will hesitate to conclude from which source Millard lifted it, together with the rest of the paragraph.

PLAINTIFF'S EXHIBIT 31.

The Gobright Story

Compare the original with my version and with Millard's.

GOBRIGHT	*MILLARD*	*EISENSCHIML*
"On the night of the 14th . . . I was sitting in my office alone, everything quiet. Having filed, as I thought, my last dispatch . . . a gentlemen addressed me . . . informing me that the President had been assassinated . . . I then went to the telegraph office, sent a short 'special' . . . taking a seat in the hack, we drove back to the theatre."	"One L. A. Gobright of the Associated Press was just closing his Washington office when the terrible news came. Rushing out, he quickly wired his papers . . . From there Gobright hurried to Ford's theatre . . ."	"L. A. Gobright, agent of the Associated Press, was about to close his office when he was informed of the tragedy. Rushing to the telegraph office, he sent a short special . . . He tore over to Ford's theatre."

Comparison between these three versions speaks for itself.

732

NOTICE

(Filed Dec 28 1955)

You are hereby notified that I have prepared my report under order of reference heretofore entered in the above entitled cause and that I have entered a rule upon all parties to file objections if any to said report on or before Jan. 23, 1956 at which time I shall take up and hear argument of counsel upon any objections that may be filed to my report.

Dated Chicago, Illinois, 27th day of Dec., 1955.

Joseph A. Graber,
Special Master in Chancery

733 * * * SPECIAL MASTER'S REPORT
UNDER ORDER OF REFERENCE

To The Honorable Phillip Sullivan, Judge Of The U. S. District Court, Northern District of Illinois, Eastern Division:

I, the undersigned, Joseph A. Graber, Special Master in Chancery of the United States District Court, Northern District of Illinois, Eastern Division, to whom the above entitled cause was heretofore referred to take testimony and report the same to this court, together with my findings of fact and conclusions of law thereon, do now submit the following report.

Pursuant to the order of reference entered in the above entitled cause, I was attended at the hour of 10 A.M., November 17, 1954, in the Federal Building at Clark & Adams Sts., Chicago, Illinois, by the following attorneys of record:

Elmer Gertz, appearing on behalf of Plaintiff;

Kirkland, Fleming, Green, Martin & Ellis, by J. B. Martineau and Don H. Reuben, appearing on behalf of defendant.

734 I have taken the testimony of Virginia M. Goldberg, Donald W. Riddle, Otto Eisenschiml, Thomas W. Naughton and Ernest Samuels.

Said witnesses were first duly sworn according to law and their testimony reduced to writing, the annexed transcript being a true, correct and complete transcript of the testimony taken by me in the above entitled cause.

I have admitted in evidence certain documentary evidence as shown by the transcript of testimony.

Included in the evidence admitted by me are the depositions of Joseph Millard, Mrs. Joseph Millard and Ralph

Daigh, all of which were taken in New York City by the parties hereto, prior to the reference.

Said depositions were sealed and filed with the Clerk of the court and by stipulation of the parties, I broke the seals and have read the depositions.

The various documents, instruments in writing described in said transcript of testimony were duly offered and received in evidence herein, and marked as exhibits as set forth in said transcript and said transcript with said exhibits contains and comprises all the evidence introduced and all the proceedings had on the hearings of this
735 cause, and are returned herewith and made a part hereof as the said transcript of testimony. No evidence was received by me or offered before me other than shown by said transcript of testimony and said exhibits.

I.

1. The complaint filed September 16, 1953 contains two counts. In Count I, it is alleged that the complainant is a citizen of the United States, and that he created and wrote an original book entitled "Why Was Lincoln Murdered," which was then copyrighted in accordance with the statute.

2. Thereafter, and in February 1953, the defendant, Fawcett Publications, infringed plaintiff's copyright by placing upon the market a work entitled "America's Greatest Unsolved Murder," which appeared in the February 1953 issue of True Magazine which is published by the defendant. The plaintiff prays for an injunction, an accounting, and an impounding of all copies of the article held by the defendant, together with all the equipment necessary to produce the alleged infringing article.

3. Count II makes a similar charge and asks for similar relief in connection with another book entitled "In the Shadow of Lincoln's Death," which the complaint alleges was written by plaintiff and published in 1940.

736 4. In its answer, the defendant admitted publication of the article entitled "America's Greatest Unsolved Murder" in the February 1953 issue of True Magazine, but denied that either of plaintiff's books were original, and denied any infringement.

5. After issue was joined, plaintiff moved the court for a summary judgment and filed in support a voluminous affidavit, together with the three works involved. The defendant submitted a counter affidavit executed by Joseph Millard, the author of its article. Plaintiff's motion was denied.

6. Thereafter, plaintiff filed admissions and interrogatories and on September 20, 1954, the order of reference was entered.

7. The plaintiff introduced the above-mentioned summary judgment affidavit in evidence during the hearing, and later amended it on its face because he admitted it contained inaccuracies.

8. A summary of the three literary works involved is as follows:

A. Plaintiff's book, "Why Was Lincoln Murdered", is a hard cover book of 503 pages, of some 29 chapters, together with supplementary notes. The book concerns the assassination of Abraham Lincoln and the subsequent history of the persons involved. The hypothesis

737 that Lincoln's Secretary of War, Edwin M. Stanton, was implicated in the assassination is the principal theme of the book. The book is presented as a scholarly work and is extensively documented and footnoted.

B. Plaintiff's second book, "In the Shadow of Lincoln's Death" is another historical work of 415 hard covered pages, 14 chapters, and supplemented by extensive notations. One prominent reviewer described "Shadow" as a long footnote to the earlier work, "Why Was Lincoln Murdered." This book is also extensively documented.

C. Defendant's magazine article, "America's Greatest Unsolved Murder" consists of about 20,000 words. It appeared in the February 1953 issue of True Magazine which consists of a total of 120 pages, and is the longest article of that issue, aggregating about 18 pages of text in addition to some illustrations. Defendant's article may be described as a sensationally written tale of Abraham Lincoln's assassination and the fate of the assassins. It contains no footnotes, bibliography, or other documentation.

9. The following persons are either parties to this cause or testified on behalf of one of the parties:

A. Otto Eisenschiml, the plaintiff, is the author of "Why Was Lincoln Murdered" and "In the Shadow
738 of Lincoln's Death." He was born in Austria and was educated there as a chemist. Eisenschiml came to the United States as a young man and became active in lecturing and writing. He has written extensively in the Lincoln assassination field and testified that he has read every piece that has ever been published on that subject.

B. Fawcett Publications, Inc., the defendant, is a Delaware corporation engaged in publishing a number of magazines, among which is True. It purchased from Joseph Millard the article later published under the title, "America's Greatest Unsolved Murder," for $1850.00, edited it, and then published the resulting

manuscript in February 1953 issue of True Magazine.

C. Joseph Millard, a free lance author for some 25 years, wrote "America's Greatest Unsolved Murder." The work was the third article of Millard published by defendant Fawcett in connection with the Civil War. Millard testified on deposition that he did not copy any of the language appearing in the plaintiff's two books and only used them along with a vast amount of other data, as source material.

D. Thomas Naughton, a former employee of the defendant, edited Millard's article in his then capacity as Associate Editor for True Magazine. At the time
739 of his testimony he had severed his connection with the defendant and is now working for Argosy Magazine. His testimony concerned the genesis of Millard's article, Millard's past dealings with the defendant and the history of the editing and preparation of the article from the time it was first submitted to True Magazine until the time of publication.

E. Ralph Daigh, the Editorial Director and Vice President of defendant Fawcett, Publications, Inc., testified upon deposition as to the general procedure the defendant follows in preparing its magazine and accepting articles for publication.

F. Virginia M. Goldberg is Otto Eisenschiml's niece and was employed by him during the writing of his two works. Her testimony was offered to demonstrate that a substantial amount of time and money was expended by plaintiff to write "Why Was Lincoln Murdered" and "In the Shadow of Lincoln's Death."

G. Dr. Donald Riddle, called as an expert witness for plaintiff, is the head of the Division of Social Sciences at the University of Illinois, Chicago Under-Graduate Division at Navy Pier, and teaches American

History. Dr. Riddle has written material on Abraham Lincoln but does not claim to be an expert on the assassination, nor does he claim expert knowledge in English or in Semantics. Dr. Riddle has also done extensive work in studying and determining the tex-
740 tual history of the New Testament, which includes comparing the various gospels language to determine literary relationships. Dr. Riddle, who is a friend of both Eisenschiml and his counsel, testified at great length for Eisenschiml to the effect that in his opinion defendant's article was a literary copying of the Eisenschiml books.

H. Dr. Ernest Samuels testified as an expert on behalf of defendant. Dr. Samuels is a professor of English at Northwestern University, a corresponding member of the Massachusetts Historical Society. Dr. Samuels recently won the Guggenheim award for his biography of Henry Adams. One of his duties at Northwestern University has been to sit as a one-man court of review when students are accused of copying their English themes. Dr. Samuels spent some 75 to 80 hours analyzing the three works involved here and testified that his examination revealed that Millard's article was an independent literary creation and it did not plagiarize either of the Eisenschiml books.

10. The plaintiff, Otto Eisenschiml, has been a manufacturer, a businessman, an author and a lecturer. He graduated from the Polytechnical School of Vienna in Austria in 1901 and then came to the United States where he secured employment with the Carnegie Steel Company as a chemist. In 1912, he established in Chicago a chemical company of his own known as the Scientific Oil Com-
741 pounding Company. He devoted most of his time to

the enterprise from its inception until the end of World War I.

11. After World War I, Eisenschiml began seriously studying about the Civil War and lecturing upon chemistry. He has written a number of articles and books on the Civil War period and for his work received an honorary degree from the Lincoln Memorial University. In the early 1920's, while investigating the battle of Shiloh, Eisenschiml began to inquire as to the conduct of various individuals who were involved in the Lincoln assassination in one manner or another. The result of this inquiry ultimately led to the employment of research assistants and the writing of the first of the two books involved here, "Why Was Lincoln Murdered," which sold 22,000 copies, and the later work, "In the Shadow of Lincoln's Death," which sold 3600 copies. Eisenschiml is today regarded as one of the world's outstanding authorities on the assassination of Abraham Lincoln, and Millard testified that no competent author would write about the assassination without studying Eisenschiml's works.

12. Both of the Eisenschiml works were written for the scholarly world and were designed to provoke thought and inspire further work in the field. The books set forth a vast amount of historical facts, all of which are
742 scrupulously documented by reference to other works, official documents, newspapers, etc. Wherever possible Eisenschiml very closely paralleled or paraphrased his sources. All of the material presented is either accepted historical fact or inferences drawn from those facts. In scholarly circles, correct historical references themselves become historical fact.

13. "Why Was Lincoln Murdered" (Pltf.'s Exh. 1) has as its dominant theme and thesis the proposition that Edwin M. Stanton, former Secretary of War, was

implicated in the murder of Abraham Lincoln, and both the critics and the reading public so read the book. Both Riddle and Samuels, the two literary experts who testified also agreed that the work clearly attempts to demonstrate that Stanton was a party in crime to the assasination.

14. Prior to Eisenschiml, other authors had suggested that Stanton's role in connection with the assassination was exceedingly peculiar; and one historical expert, a Pulitzer winner (whom plaintiff cites with approval in his affidavit), states that Eisenschiml merely added to this body of writings.

15. "In the Shadow of Lincoln's Death" (Pltf.'s Exh. 2) is described by critics, and also by the plaintiff himself, as a long footnote to the earlier book. Although 743 the complaint sets up the claim of infringement of "Shadow" as it it were of equal importance and extent as the claim of infringement of "Why Was Lincoln Murdered," plaintiff volunteered upon direct examination that the latter book is the main subject of this suit.

16. The complaint alleged that the plaintiff is a citizen of the United States but this fact was not proved upon the hearing. Attention was directed to a Presidential Proclamation extending to subjects of Austria the privilege of securing an American copyright and it was then stipulated that the plaintiff is entitled to the protection of the American copyright laws, either as a resident alien, or as a subject of Austria.

17. Joseph Millard, age 47, has been a writer for twenty-five years. Unable to attend college because of a lack of funds, he entered the advertising business shortly after his graduation from high school. During his employment in the advertising field he did a considerable amount of writing and for the last sixteen years

has earned his living exclusively as a free lance author. Millard has written prolifically, having sold over a thousand stories by the time of his deposition. Until this suit, he has never been accused of plagiarism and his writing career will suffer serious damage if he is found guilty of copying.

744 18. Some fourteen years ago, Millard became a dedicated student of the Civil War period, as a result of an acquaintanceship with Manley Hellman, a well-known historical writer who roused his interest in writing about the period. In order to obtain historical background for his writings, Millard began, again some 14 years ago, to assemble a Civil War library which today aggregates a vast quantity of books, magazines and newspapers worth roughly several thousand dollars. During his deposition in New York, Millard produced some 100-odd different books and other material concerning the Civil War period, which he estimated was less than ten per cent of his total library. The remainder was then in storage in Philadelphia awaiting shipment to his new home.

19. Prior to buying the alleged infringing article, "America's Greatest Unsolved Murder," from Millard, the defendant, Fawcett Publications, had purchased and published two of his earlier writings concerning the Civil War. The first of these, "The Spy Who Saved The Union," concerned the exploits of one Felix Stidger, an undercover man who exposed the dangerous Copperhead Society called Knights of the Golden Circle, and was published by True in December 1945 (Deft.'s Exh. 4). As a result of this work, Millard was asked to address the Civil War Round Table of Chicago, an association of

745 distinguished men interested in the study of history and people of the Civil War. The plaintiff and his

which on being searched proved to be
letters. and from the things found in
the Room he was caught. I would like
you to give this due consideration and
if it is worth anything I hope to
receive it. this Statement I can
prove by two or three ~~Detectives~~ now
in the service of the Government.

Yours Most Respectfully
Michael Kenny
Bartender

counsel, Mr. Elmer Gertz, are members of the Civil War Round Table.

29. The second Millard story, "The Devil's Errand Boy," published in the July 1947 issue of True magazine, is about incidents in the life of Lafayette Baker, one-time intimate of Edwin M. Stanton and head of the Secret Service during the Civil War. In 1946, while engaged in doing research for this article, Millard met the plaintiff at his home, spending an hour and a half with him in his Civil War Library. After the meeting, Eisenschiml sent the following letter to Millard (M. Dep. 425; R. 1750):

"July 26, 1946.

"Dear Mr. Millard:

"I apologize for having caused you sleepless nights, but if it is any consolation to you, just think of the many sleepless nights I spent before I wrote my books on Lincoln's assassination. I knew I was playing with dynamite and could imagine the effect it would have on the historical community when I detonated it.

"I hope you don't mind the digging you'll have to do on Baker. Digging out historical facts is lots of fun, and if you strike something that has never been published before it gives you quite a thrill.

"The first result of your digging is already apparent. I had no idea that Baker and Sherman were on opposite sides of the fence during the Vigilantes period in San Francisco, but I think this is extremely
746 interesting. I have found Sherman's 'Memoirs' as unreliable as you have found them, although my criticism pertains to other chapters of his book, such as the battle of Shiloh. Sherman made a mess of things there, and instead of acknowledging it tried to lie himself out of them. He changed the map of Shiloh

time after time until 1881, showing troop concentrations where they should have been, but were not, etc. (This is not for publication.)

"I take it that Baker did not turn on Sherman for two reasons. In the first place, their interests did not clash; but when Baker was in full power, Sherman was out West, and there was no contact between the two. In the second place, Baker was a blustering coward at heart and would probably have licked Sherman's boots, knowing that Sherman was the stronger. We also know that Sherman kept away from Washington intrigues.

"What Stanton meant when he said 'one or two prisoners', defies explanation. The only suggestion I have is that Stanton as a lawyer always expressed himself so that he left a loophole for himself. You know that lawyers try to cover everything they can. Baker might have picked up someone else on the way to Washington, and Stanton probably did not want to be awakened in the middle of the night to interpret his order of 'one prisoner.'

"I am much obliged for your information on the Greek fire. It still does not make good sense to me, chemically speaking, and I'll appreciate anything further you run into.

"Since my two books came out I have been hoping against hope that someone else may take up where I left off and find additional material either in confirmation or in refutation. Nothing at all has appeared, so far as I know. Most historians being merely rehashers and both financially and mentally unable to do any digging of their own, my hope now rests in you. You have the curiosity that is the foundation of good research work and the persistency that must accompany it. I have received praise and

747 I have received abuse, neither of which has furthered the cause. What we want is the truth, and I don't care much whether I am shown to be right or wrong.

"So far as I know, only one man now is working on the assassination problem, and that is David Rankin Barbee of 2838—28th St., N.W. Washington, 8 D. C. He was editor-in-chief of the Washington Post and has a great deal of material most of which, he says, has never been published. I have great respect for Mr. Barbee, but I know nothing about his material. All I know is this: When my first book came out, he jumped all over me claiming that Stanton had nothing to do with the assassination; but lately he has apparently swung around to my way of thinking, and once he told me over the telephone that he had proof of a secret meeting between Stanton and Booth shortly before the murder. Barbee is 72 years old, in bad health and in worse humor, and would probably treat you very brusquely if he knew you were stepping into his field. There is merely an assumption on my part.

"Please keep me posted, and if I can be of any help to you do not hesitate to call on me.

"Cordially yours,

OE:nic (Signed) Otto Eisenschiml."

In turn, Millard, in "The Devil's Errand Boy" acknowledged Eisenschiml's contributions and encouragement, writing at page 75 of True Magazine for July 1947:

"Mr. Otto Eisenschiml of Chicago, the outstanding authority on Abraham Lincoln's death, has devoted a lifetime of intensive research to the subject. His two books—'Why Was Lincoln Murdered' and 'In the Shadow of Lincoln's Death'—are packed with his own sensational discoveries. Yet he feels the surface has barely been scratched."

21. Lafayette Baker's part in tracking down Lincoln's assassin, John Wilkes Booth, forms an important part
748 of "The Devil's Errand Boy" and while writing it, Millard conceived the idea of doing a later work on the Lincoln assassination itself. In the spring of 1951, Thomas Naughton, then an editor of True, suggested to Millard that he write his story of the assassination, as if it were a mystery that still remains unsolved. Naughton broached the idea to Millard because Millard was a known Lincoln student and because Naughton had obtained the inspiration for such a treatment of the Lincoln assassination from "The Devil's Errand Boy." Thereafter, Millard labored some three and a half months researching for the story, and another month in its actual writing. The finished manuscript was sent to defendant, Fawcett Publications, for acceptance or rejection probably in the early fall of 1951.

22. In writing of Lincoln's assassination, Millard relied upon the research he had already done in connection with his earlier two Civil War articles described above, "The Devil's Errand Boy" and "The Spy Who Saved the Union." During the period he was writing the three stories, he read all available material, going wherever possible to the original sources. Aside from using the various books in his collection, Millard engaged in research at the following places:

(a) The Library of Congress, where Millard worked around the Central Desk and from the vast files found there.

(b) The National Archives. While here collecting data, on occasions Millard would discuss various aspects of
749 the Civil War with David Rankin Barbee and the State Archivist of Tennessee.

(c) The New York Public Library. Millard was there assisted in his work by Vincent Vigilante who was in charge of the American History Room.

(d) The Chicago Historical Society, where Millard procured help from Dr. Paul Angle.

(e) The Abraham Lincoln Book Store in Chicago. Millard received some suggestions for his work from the store's proprietor, Ralph Newman. During one of these visits Newman apparently introduced him to Eisenschiml.

(f) The Public Library of Sarasota, Florida. The library was helpful within certain limits, containing some good southern Civil War material.

(g) The Public Library of Tampa, Florida. Millard found the best material from the southern side collected in this institution.

(h) The Public Library of Westwood, New Jersey, where Millard testified the Civil War collection was small but unusually helpful books were found because of the librarian's particular interest in the period.

23. Among the works Millard consulted prior to writing his article on the assassination were Eisenschiml's
750 two books, "Why Was Lincoln Murdered" and "In the Shadow of Lincoln's Death," from which he used certain information then presented as facts of history. He also consulted and used in connection with the story a number of other known works written by other acknowledged authorities. Some of these are:

"Personal Memoirs of U. S. Grant"; "Grant in Peace"; "History of the United States Secret Service"; "Diary of Gideon Welles"; "The Assassination of Abraham Lincoln and the Trial of the Conspirators"; "Recollections of Men and Things at Washington"; "Conspiracy Trial for the Murder of the President"; "Abraham Lincoln — The War Years"; "The Assassination of Abraham Lincoln"; "The Assassination of Abraham Lincoln and Its Expiation"; "Lincoln in the Telegraph Office"; "Reveille

in Washington — 1860-1865"; "The Death of Lincoln"; "Edward McMasters Stanton"; "Through Five Administrations"; "The Great American Myth"; and "The Assassination of Lincoln."

24. In addition to the use of various historical books and biographies, Millard, in preparing to write about the assassination, also read the Congressional Record, various historical journals, and pertinent newspaper stories of the period.

25. As originally written, Millard's article contained some 40,000 words and was called "History's Maddest Murder Case." Although he knew that the defendant did not publish articles aggregating more than 20,000 words, he wrote this longer story in the hope that it would be published in two parts. In accordance with the custom in the publishing of popular magazines, the article 751 did not contain either footnotes or a bibliography. This custom is followed by the plaintiff when he writes for such media. However, Millard's original manuscript, Deft.'s Exh. 1, contained in its body the following complimentary reference to the plaintiff:

> "Dr. Eisenschiml, probably the world's leading authority on the mysteries of the Lincoln assassination, has in one curt sentence treated Stanton's story to the respect it deserves. He writes 'It would be exceedingly interesting to have the name of the bell ringer who was so busy with other orders that he had the audacity to incur the ire of the all-powerful Secretary of War by postponing the repairs on what was then perhaps the most important doorbell in Washington.'"

26. When the defendant, Fawcett Publications, received Millard's article, Naughton called him and received permission to mark his manuscript. Naughton then edited

the story, reducing it from 40,000 to 20,000 words and changed the title to "America's Greatest Unsolved Mystery." In the course of his work, Naughton, who was unfamiliar with Eisenschiml's books, deleted the above described "bell ringer" anecdote and with it the reference to Eisenschiml. Millard was not consulted about any of the eliminations made and he did not discover the deletion of Eisenschiml's name until the article was finally published.

27. After Naughton completed his job of editing, the manuscript was given to Charles N. Barnard, another 752 associate editor of True for reading and comment. It was then given to Ken Purdy, the Magazine's Managing Editor, who, like Barnard, thought the story worthwhile and worthy of purchase. Finally, the edited story was given to Ralph Daigh, Fawcett's Executive Vice President, who read the comments of his editors and then approved the purchase of the article.

28. The manuscript was then photostated, illustrated and placed in Fawcett's files for approximately one year prior to actual publication because it was to be held for release in a February issue. The article was finally printed in late 1952 and appeared as the book-length feature of the February 1953 issue of True.

29. Millard received $1,850.00 for his work, in return for which, at the time of purchase, he executed the following agreement, Defendant's Exhibit 3:

AUTHOR'S AGREEMENT.

$1,850.00

Received from Fawcett Publications, Inc. the above mentioned sum as payment in full for the manuscript or work entitled History's Maddest Murder Case by Joseph Millard and all literary property and other

rights therein, including complete publication rights and the right to copyright same in the name of Fawcett Publications, Inc. and to make editorial changes therein deemed necessary.

The undersigned warrants the originality, authorship and ownership of said work; and grants to Fawcett Publications, Inc. the right to publish or authorize
753 the publication of the author's name and picture in connection with the publication of said work, or advertise same, including the right to publicize said work in such a way as Fawcett Publications may desire in connection with publication of said work. Sixty days after publication by Fawcett Publications, Inc. it will reassign to the author, upon written request, all rights in said work, except the right to publish same in original, digest or other form in magazines or periodicals. After reassignment of such rights, the author shall at all times cause the rights in said work reserved by Fawcett Publications, Inc. to be protected by proper copyright notice.

Dated: Jan. 30, 1952.

Joseph Millard

30. A similar agreement was signed by Millard before the defendant bought "The Devil's Errand Boy" and "The Spy Who Saved the Union." After receiving his check, Millard quickly turned to something else for he believed that in the light of the time and effort expended, he had lost money on the project.

31. "America's Greatest Unsolved Mystery" as written and finally published is an independent literary creation based upon Joseph Millard's independent research concerning the assassination of Abraham Lincoln. The article as contemplated and written tells a story of mystery, bafflement, horror and confusion in the framework

of historical fact. Written in a fictional vein, the work does not attempt to solve any of the supposed mysterious happenings of the assassination but only raises questions and surrounds the event with an aura of the unknown
754 and the supernatural. If any solution at all is offered to the riddles concerning Lincoln's assassination, it is the suggestion that strange forces and unavoidable fate were at work.

32. The only discernible resemblance between Millard's tale and Eisenschiml's work is that both make use in varying degrees and manners of certain historical facts. There is no similarity between the language, organization, structure, or literary purpose of the three works.

33. True is a magazine for popular reader consumption and has a general circulation. It is rarely, if ever, cited or used for scholarly purposes and both the plaintiff and Dr. Samuels testified they do not read the magazine. Both "Why Was Lincoln Murdered" and "In the Shadow of Lincoln's Death" were written for an entirely different group — the world of scholars and historians. Lincoln scholars who have requested permission of Eisenschiml to reproduce portions of his book were permitted to do so without even affixing his copyright notice to the material so published.

34. The plaintiff asserted in his affidavit supporting his motion for summary judgment that the publication by the defendant of "America's Greatest Unsolved Murder" destroyed the market for his works and prevented him from obtaining the publishing of another edition of both of
755 his books. Subsequent to the reference, however, Harper & Brothers published a book entitled "The Day Lincoln Was Shot," which deals with the assassination and appeals both to the general and scholarly public. This book has been enormously successful and is presently en-

joying a tremendous circulation. Upon cross-examination, the plaintiff conceded that he cannot sustain his claim that the Millard work seriously damaged his market and this charge has been withdrawn.

35. In recent years, a controversy has arisen among historians as to the accuracy of the reports of the Civil War, and Eisenschiml is a member of a group known as the "Revisionists" who propose a complete rewriting of the history of that era. Aside from this controversy, there has always been a great interest in the Civil War which is evidenced by the enormous number of writings concerning that portion of American history and the formation of study groups such as the Civil War Round Table. Judicial notice may be taken of the fact that in recent years the interest in the Civil War has increased to such an extent that a book club is to be formed to distribute Civil War material. Both of the authors' works involved here are merely part of this vast store of writings, and both Joseph Millard and Otto Eisenschiml has each in his own way contributed something to this large and ever increasing body of knowledge.

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II.

From all of the evidence introduced in this cause, both oral and documentary, and from the files and records herein —

A. The court has jurisdiction of the parties hereto and of the subject-matter hereof.

B. The article "America's Greatest Unsolved Mystery" published by the Fawcett Publications in its February 1953 issue of True Magazine, did not in any way infringe upon any copyrightable material contained in the plaintiff's work, "In the Shadow of Lincoln's Death." "America's Greatest Unsolved Mystery" is an independent lit-

erary creation based upon independent research, and whatever use Millard made of plaintiff's work was a *fair use*, for Millard did not in any way infringe upon plaintiff's market, wrote for a totally different purpose and had no intention to copy, plagiarize or imitate.

C. The article "America's Greatest Unsolved Mystery," published by the defendant, Fawcett Publications, in its February 1953 issue of True Magazine, did not in any way infringe upon any copyrightable material contained in the plaintiff's work "Why Was Lincoln Murdered." "America's Greatest Unsolved Mystery" is an independent literary creation based upon independent research, and whatever use Joseph Millard made of
757 Otto Eisenschiml's work was a *fair use*, for Millard did not in any way infringe upon Eisenschiml's market, wrote for a totally different purpose, and had no intention whatever to copy, plagiarize, or imitate.

D. Fair use may be defined as a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright (Story v. Holcome, Fed. Case No. 13497; Lawrence v. Dana, Fed. Case No. 8136, 16 So. Calif. L. Rev. 249). Fair use is allowed by law on the ground that the appropriation is reasonable and customary (Shapiro, Bernstein & Co. v. Collier & Son, 26 U.S. Pat. Q. 40). Ball, the Law of Copyright, Pars. 125, 126.

E. Plaintiff seeks to prove a copyright infringement by what he claims are parallel phrases and ideas. This theory appears from his affidavit in support of his motion for summary judgment, and in the evidence he introduced before the Master. Thus some 64 various fragments and phrases of the two separate Eisenschiml works are commingled and the resulting blend is compared, as if it were

but one copyrighted book, to Millard's article. Plaintiff asserts that any similarities that are found in the comparison occurred because Millard copied from Eisenschiml. Eisenschiml also tries to demonstrate that Millard copied various new ideas and facts from him which, he claims, he was the first to publish to the world. These alleged
758 new ideas and facts are set up in plaintiff's affidavit in support of motion for summary judgment as amended and from his testimony. The Master concludes that none of this evidence, which is plaintiff's whole case, shows a copyright infringement.

F. Most of plaintiff's case is based upon the comparison of sixty-four certain phrases appearing in his two works as commingled, with sixty-four phrases found in Millard's article. But it should be noted that in preparing these sixty-four alleged parallels, plaintiff in many instances not only fused together unrelated portions of the three works in question, but he also merged his comparison of his two books and the Millard story into one exhibit despite the fact that each of his two books is a totally separate cause of action. If parallels are to be used at all on the question of infringement, then the only fair and proper manner of demonstrating alleged parallels would be to make two separate comparisons. The first comparison should be between the thirteen phrases found in the "Shadow" book and the Millard article, and the second between the fifty-one phrases from the "Why" book and the Millard article. In setting forth both sets of alleged parallels, the plaintiff should not have omitted portions of the language involved. The fact that plaintiff has seen fit to proceed as he did has not been of any assist-
759 ance to the Master but rather has increased his labors and the time necessarily devoted by him to a consideration of this case.

G. The record is abundantly clear that although some of the Eisenschiml quotes that he claims were literally copied by Millard were in fact used only as source material by Millard, in all instances a parallelsim of language is practically non-existent. The relatively few similarities of language between the conflicting works quite clearly occurred either because of "verbal echoes" or because of a similarity of historical subject-matter. Many of the parallels that Eisenschiml asserts were copied from him are relatively insignificant segments of his books. Thus, taking plaintiff's case at best, any portions of Eisenschiml's works Millard may have used were so insignificant as to call for an application of the doctrine of de minimis non curat lex. Finally, the plaintiff, by consenting to have a part of his work published by others without his copyright notice being affixed, has lost whatever copyright he may have had to that particular material (17 U.S.C.A., § 19; Miffin *v.* White, 190 U.S. 260; New York Life Insurance *v.* Wolf, 85 F. 2d 162).

H. Millard denied under oath that he copied the sixty-four alleged parallels of Eisenchiml and the 760 only evidence offered in contradiction by plaintiff was the opinion evidence of Dr. Ronald Riddle. Although Riddle testified there was little if any language copied, he gave it as his opinion that Millard derived the sixty-four items from Eisenschiml, because all of the material contained in the parallels was readily available in Eisenschiml's two works and Millard was probably too lazy to research elsewhere. Upon reconsideration Riddle conceded that if Millard testified that he had researched elsewhere, then Riddle's assumptions were null and void. Further, Dr. Riddle also found from his examination that Millard did research other sources and thus his probability theory is patently meaningless.

I. Parallel analysis should be used in copyright suits with great caution for literary authorities and the courts have pointed out that parallels are misleading and may be completely valueless. Funkhouser *v.* Loew's, 208 F. 2d 185, 189. "Parallel hunting" (as it is called by some writers) may find likenesses when none exist; it totally ignores differences that might render the parallel meaningless; it dismembers a literary work instead of treating it as a unified whole which must be done for a proper critical analysis; and it ignores the possibility that both authors derived from a common source.

J. For the foregoing reasons, the sixty-four alleged instances of parallelism cited by the plaintiff do not 761 demonstrates a plagiarism or a copying by Joseph Millard and his use of some of the plaintiff's sixty-four quotes as source material was a fair use and non-actionable.

K. Eisenschiml also contends his copyright was infringed upon because the Millard article makes use of a number of new facts and ideas of history that were allegedly first published in the Eisenschiml books. This claim is set forth in plaintiff's affidavit as amended. It is plaintiff's position that without either his permission or a completely independent examination of the sources, no author can state such historical matters as the historical fact that Lincoln was shot at 10:13 P.M., on April 14, 1865; that there was a mystery about Lincoln's death, or that radical Republicans and Edwin M. Stanton stood much to gain by Lincoln's assassination. Approximately some 30 odd historical facts are given in plaintiff's affidavit as material that cannot be discussed or mentioned by other authors without infringing upon his copyright. It is clear, however, that no grounds for infringement exist even if Millard is indebted to the plaintiff for all of these ideas and facts.

L. The law of copyright does not protect ideas but only an author's mode of expression. Holmes *v.* Hurst,

174 U.S. 82; Dymow *v.* Bolton, 11 F. 2d 690; Sheldon
762 *v.* M.G.M., 81 F. 2d 49. The rule is particularly appropriate in the field of history and it is pure superarrogation for one to suggest that he has any proprietary interest in any era of history, particularly a period that is as extensively written about as the Civil War. Oxford Book Co. *v.* College Entrance Book Co., 98 F. 2d 688; Funkhouser *v.* Loew's, 208 F. 2d 185. In scholarly circles a particular theory or idea may after a time become identified with the individual first espousing it and if so, it is a departure from scholarly practice to discuss the idea without crediting its originator. The plaintiff has confused this protocol with the copyright law. To adopt plaintiff's contentions here would be to stifle thought.

M. The plaintiff's case lacks any merit whatsoever and thus, pursuant to Title 17 U.S.C.A., § 116, the defendant is entitled to recover a reasonable attorney's fee from the plaintiff as well as all costs of this suit.

CONCLUSION

1. I therefore respectfully recommend that the court enter judgment for the defendant.

2. That the plaintiff be taxed all costs of this proceeding including payment of a reasonable attorney's fee.

Respectfully submitted,

Joseph A. Graber
Special Master in Chancery,
U. S. District Court,
Northern District of Illinois,
Eastern Division

763 I, Joseph A. Graber, Special Master in Chancery in the United States District Court for the Northern District of Illinois, Eastern Dixision, do hereby certify that I have performed the following services under the order of reference heretofore entered in the above entitled cause:

Examining and considering the complaint, the answer thereto; affidavit and exhibits attached thereto, and defendant's answer thereto, plaintiff's motion for summary judgment and affidavit with exhibits attached thereto; defendant's answer to same and the court's ruling thereon, plaintiff's requests for admissions and the defendant's response thereto, plaintiff's brief in support of his motion for summary judgment, the court's ruling thereon and order of reference entered.

Hearings were had on various dates from November 17, 1954 to December 21, 1954, on which date proofs were closed. Time spent on hearings was fifty-four hours. Reading and considering the testimony (Depositions 595 pages, and testimony heard by the Master, 2550 pages), examining and considering the forty-two (42) exhibits offered on behalf of the parties hereto, consisting of many hundreds of pages, examining and considering the respective proposed findings and suggestions of the parties, 764 examining authorities and preparing the Master's report and findings thereon; in all expending one hundred eighty-five hours (185) and, in addition thereto, the fifty-four hours spent in attending hearings, making a total of two hundred forty hours (240). The parties hereto have deposited with the Master the sum of Three Thousand Dollars ($3000.00) for fees and I respectfully ask the court to allow the additional sum of Three Thousand Dollars ($3000.00).

Respectfully submitted,

Joseph A. Graber
Special Master in Chancery,
U. S. District Court,
Northern District of Illinois,
Eastern Division

765 A copy of the letter mailed to the following attorneys Dec. 27, 1955:

UNITED STATES DISTRICT COURT
Office of the Clerk
United States Court House
Chicago 4
December 28, 1955

Mr. Elmer Gertz
120 South LaSalle St.
Chicago, Ill.

Kirkland, Fleming, Green, Martin & Ellis
33 North LaSalle St.
Chicago, Ill.

53 C 1912
Otto Eisenschiml
vs.
Fawcett Publications, Inc.

Dear Sirs:

Pursuant to Rule 53(e)(1) of the Rules of Civil Procedure for District Courts of the United States you are hereby notified that the Honorable Joseph A. Graber, Special Master in Chancery, filed his Report, a copy of which is attached, on December 28, 1955.

Yours very truly,
Roy H. Johnson
Clerk
By Thelma Benson
Deputy Clerk

766

NOTICE OF FILING OBJECTIONS TO SPECIAL MASTER'S REPORT, CERTAIN EXHIBITS AND SUGGESTED FINDINGS
(Filed Jan 4—1956)

Pursuant to Rule 53 (e) (2) of the Rules of Civil Procedure for District Courts of the United States, you are hereby notified that the plaintiff, Otto Eisenschiml, is this day filing with the Clerk of this Court his objections to the Report of the Special Master (filed with the Clerk on December 28, 1955), a copy of which objections is hereto attached and served upon you; and the plaintiff will make application to the Court for action upon the report and upon objections thereto as prescribed in Rule 6 (d).

Please take further notice that with the said objections the plaintiff is filing as a part thereof the original of his Suggested Findings of Fact and certain exhibits
767 which were received in evidence but were not in the possession of the Special Master when he considered, prepared and filed his said report.

January 4, 1956.

* * *

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EXCEPTIONS OF PLAINTIFF TO SPECIAL MASTER'S REPORT

Now comes Otto Eisenschiml, the plaintiff in the above entitled cause, by Elmer Gertz, his attorney, and objects to the report of the Honorable Joseph A. Graber, Special Master herein, filed in the office of the Clerk of this Court on the 28th day of December, 1955, in the following particulars, to wit:

1. To the following findings of facts and to each and every part thereof (the numbering being as in the Special

Master's Report): 4, 6, 7, 8A, 8B, 8C, 9C, 9D, 9E, 9F, 9G, 9H, 12 to 35, both inclusive.

2. To each and all of the conclusions of law, identified in the Special Master's Report by the letters A to M, both inclusive.

3. To the conclusion on page 30 of the Special Master's Report, and to each and every part thereof.

769 4. To the statement on page 2 of the Report that "Included in the evidence admitted by" the Special Master is the deposition of "Mrs. Joseph Millard . . . taken in New York City by the parties hereto, prior to the reference", because said deposition was taken on written interrogatories and cross-interrogatories on Sarasota, Florida, after the order of reference and the commencement of the hearings herein, and because the facts with respect thereto are as set forth in Plaintiff's Suggested Findings of Fact No. (75), heretofore filed with the Special Master and incorporated here by reference with the same force and effect as it set forth herein in full.

5. To the statement on Page 3 of the Report that all of the exhibits are filed with the Report and made a part thereof, because in fact the Special Master never gave the opportunity to the plaintiff to file Plaintiff's Exhibits Nos. 4, 15, 20, 21, 22, 23, 24, 25, 27, 27A, 28, 29, 30, 31 and 32, and prepared and filed his Report without having said exhibits or any of them before him or having given any consideration to them. The Special Master not having a regular office or place of business, plaintiff's attorney wrote to him at his then residence on July 15 and July 29, 1955, September 1, 1955, and October 13, 1955, and also telephoned him on several occasions, to make arrangements to file the said exhibits with him and to substitute the original of the Plaintiff's Suggested Findings

of Fact in place of the carbon copy that had been mailed to him. Said Master verbally advised plaintiff's at-
770 torney that he would arrange a time and place for such deposit, but in fact he never did so. Accordingly, the said Plaintiff's Exhibits and the said original of the Plaintiff's Suggested Findings of Fact are herewith filed with the Clerk of this Court. The pertinent excerpts from the said four letters of plaintiff's attorney to the Special Master are set forth in Exhibit "A", hereto attached and by express reference made a part hereof.

6. To the failure of the Special Master to make the findings of fact and each such finding set forth in the Plaintiff's Suggested Findings of Fact, a copy of which has heretofore been filed with the Special Master and the original of which is now filed with the Clerk of this Court and by express reference made a part of these exceptions with the same force and effect as if set forth herein in full.

7. To the failure of the Special Master to make the Conclusions of Law and each such conclusion set forth in the Plaintiff's Suggested Conclusions of Law, the original of which has heretofore been filed with the Special Master and a copy of which is hereto attached, marked Exhibit "B" and by express reference made a part hereof with the same force and effect as if set forth herein in full.

8. To the failure of the Special Master to strike and refuse to consider as having any legal or factual validity the following Defendant's Exhibits, and each of them,
771 and to his attaching substantial evidentiary and legal weight to them, and each of them, and basing his findings and conclusions thereon: Defendant's Exhibits 3 and 7 of its Millard Deposition of March 25, 1954 and following; Defendant's Exhibits 3, 4, 8, 9, 12, 13; De-

fendant's Exhibit 4 of May 16, 1955; Defendant's Exhibits 1, 2 and 3 of May 27, 1955.

9. To the failure of the Special Master to consider all of the admissions made by the defendant through its pleading, its partial responses to plaintiff's requests for admissions, its partial responses to plaintiff's interrogatories, its admissions and stipulations entered into during the course of the hearings before the Special Master, the stipulation as to The Civil War Round Table entered into following the close of proofs, and its failure to object to the various Plaintiff's Exhibits and particularly Plaintiff's Exhibits 7 and 20.

10. To the failure of the Special Master to find and conclude that costs and fees should be taxed against defendant, because of: (a) its failure to admit plaintiff's citizenship; (b) its unreasonably prolonged, repetitious and vexatious cross-examination of Dr. Donald W. Riddle; (c) the unreasonably prolonged examination and cross-examination of Joseph Millard resulting from the misleading display by defendant of a large number of books and much printed matter having no relevancy to the issues and from alleged source cards admitted as not necessarily listing the sources used by Millard; (d) the use 772 of Defendant's Exhibit 4 of May 16, 1955 in its original form; (e) the introduction in evidence by defendant of books and articles having nothing to do with the issues.

11. To the failure of the Special Master to consider any of the material set forth in Plaintiff's Objections and Responses to Certain Suggested Findings Proposed by Defendant and in Plaintiff's Additional Memorandum on "Fair Use."

12. To the failure of the Special Master to consider or attach any weight to the prevailing law in the United States Court of Appeals for the Seventh Circuit, and

particularly Toksvig *v.* Bruce Publishing Co., 181, F. 2d 664, decided on May 5, 1950, and Chicago Record-Herald Co. *v.* Tribune Association, 275 Fed. 797; and his failure to consider or attach any weight to any leading authorities other than those unapplicable cases cited by defendant, and particularly his failure to consider the following: Henry Holt & Co., Inc. et al *v.* Liggett & Myers Tobacco Co., 23 Fed. Sup. 302 (where the copying of only three sentences for commercial profit was held to be an unfair use); Associated Music Publishers, Inc. *v.* Debs Memorial Fund, Inc. et al, 141 Fed. 2d 852; Loew's Inc. et al *v.* Columbia Broadcasting Co., Inc. et al, 105 U.S.P.Q. 302, 308 ff. (decided May 6, 1955); Golding *v.* R.K.O. Pictures, 221 P 2d 95; Morse *v.* Fields, 104 U.S.P.Q. 54 (decided Dec. 1954); Adventures in Good Eating, Inc. *v.* Best Places to Eat, Inc. et al, 131 F. 2d 809-10, 56 U.S.P.Q. 773 242 (7th CCA, 1942); Dellar *v.* Samuel Goldwyn, Inc., 40 F. Supp. 534, 50 U.S.P.Q. 372; Hartfield *v.* Peterson, 34 U.S.P.Q. 305; Harris *v.* Miller, 50 U.S.P.Q. 261, and those other authorities cited in the documents filed by Plaintiff with the Special Master.

13. To the failure of the Special Master to find that since the Complaint was filed in good faith and with reasonable cause no attorney's fees should be assessed against plaintiff, but should be assessed against defendant.

14. To the failure of the Special Master to permit the plaintiff, as requested by him, to add approximately seventy additional parallels to the exhibit filed by defendant as an appendix to its Suggested Findings. (See Exhibit "A" hereto attached.)

15. To the failure of the Special Master to make findings, inter alia, as to the following (the details and supporting data for which are set forth in the parenthetically indicated Plaintiff's Suggested Findings of Fact):

(a) Exhibit "C", attached to Plaintiff's Exhibit 7, correctly sets forth in the first column thereof passages from the Millard book-length feature in defendant's magazine True and correctly sets forth in the second column thereof passages from the two Eisenschiml books in issue herein, all as admitted by defendant. (Pltf. Sugg. Find. No. 46)

(b) Defendant's letter to Charles E. Mason, admitting that it should have credited plaintiff. (Plts. Sugg. Find. Nos. 53 and 4C and Par. 24 of Pltf. Exhb. 7)

774 (c) Defendant never submitted Millard article to historians or authorities on the Lincoln Assassination prior to its publication, despite the recommendation of its own editorial staff that such be done. (Plf. Sugg. Find. Ns. 4g and 59)

(d) The long period of time in which defendant could have checked sources and sought for evidence of copying by Millard. (Plf. Sugg. Find. No. 40)

(e) The True circulation figures. (Plf. Sugg. Find. Nos. 4j and 4k and 54)

(f) Admissions that Millard and therefore defendant had access to plaintiff's books. (Plf. Sugg. Find. No. 5)

(g) The originality of the plaintiff's two said books. (Plf. Sugg. Find. Nos. 8, 12, 18, 19, 65)

(h) The matters and things proved as a matter of law through the copyright certificates themselves (nationality, originality, compliance with provisions of statute, etc.)

(i) The vast expenditure of labor, time, ingenuity and money by plaintiff in connection with his two books. (Plf. Sugg. Find. No. 16)

(j) Defendant must have known of Millard's indebtedness to and copying from Eisenschiml from its prior publication of Millard's Lafayette Baker article in July, 1947. (Plf. Sugg. Finds. Nos. 17, 4f)

(k) Plaintiff's notice to defendant of its infringement, and defendant's subsequent sale and advertisement of the infringing article (Plf. Sugg. Find. No. 23)

775 (l) The new factual material and the new interpretation of older material presented for the first time in plaintiff's two books and copied by defendant. (Plf. Sugg. Find. No. 25 and all sub-paragraphs thereof)

(m) The deductions, inductions, conclusions and speculations presented for the first time in plaintiff's two books and copied by defendant. (Plf. Sugg. Find. No. 26 and all sub-paragraphs thereof)

(n) The underscorings and markings in Plaintiff's Exhibits 1 and 2 (his two said books) as keyed to Exhibit "C" in Plaintiff's Exhibit 7 and the significance thereof. (Plf. Sugg. Finds. Nos. 27C and 28C)

(o) Adequate descriptions and summaries of plaintiff's two books. (Plf. Sugg. Finds. Nos. 27 to 45, both incl.)

(p) Tie-ins, or similarities, between plaintiff's two books and defendant's article, both on an over-all basis and in detail (Plf. Sugg. Find. Nos. 30 to 46, both incl., and particularly No. 46)

(q) The characters other than Stanton have relatively minor roles in both the Millard article and Eisenschiml's Why. (Plf. Sugg. Finds. Nos. 48 and 49)

(r) Millard closely followed or copied Eisenschiml's treatment of Stanton. (Plf. Sugg. Find. No. 50)

(s) Also his treatment of Lincoln. (Plf. Sugg. Find. No. 89)

776 (t) Also his treatment of Gen. and Mrs. Grant. (Plf. Sugg. Find. No. 90)

(u) Also his treatment of Booth. (Plf. Sugg. Find. No. 91).

(v) Also his treatment of Parker. (Plf. Sugg. Find. No. 92)

(w) Also his treatment of O'Beirne. (Plf. Sugg. Find. No. 93)

(x) Also his treatment of Miss Harris and Major Rathbone. (Plf. Sugg. Find. No. 94)

(y) Also his treatment of Fletcher. (Plf. Sugg. Find. No. 95)

(z) Millard copied or paraphrased substantially the very language of portions of plaintiff's books (including the so-called Quotes, or parallelisms, set forth in Plf. Sugg. Find. Nos. 57 and 91g and 94b).

(aa) The qualifications and testimony of Dr. Donald W. Riddle. (Plf. Sugg. Finds. Nos. 60 to 67, both incl.)

(bb) Millard's general attitude and state of mind on the use of sources indicates that he appropriated the plaintiff's research instead of doing his own research on the matters touched upon by plaintiff in his books. (Plf. Sugg. Find. No. 68) Millard's admission as to his lack of original research and lack of original material (Millard deposition pp. 201-2).

777 (cc) Millard admitted that various substantial portions of this article derived from Eisenschiml's books (Plf. Sugg. Find. No. 69). *E.g., at page 63 of the Millard Deposition, defendant's own counsel read Quote 22, and then asked Millard: "Did you steal or pirate that from Dr. Eisenschiml?" To this, Millard replied: "I am rather afraid I did . . ."*

(dd) Millard admitted that various portions of the cut-out or deleted part of his manuscript derived from Eisenschiml. (Plf. Sugg. Find. No. 70)

(ee) Neither Millard nor defendant ever asked or received permission to use the Eisenschiml material, and the article as published did not in any way credit Eisenschiml. But others (Sandburg, DeWitt and others) are credited in the Millard article. (Plf. Sugg. Find. No. 78)

(ff) The Parker story is a substantial part of both the Millard article and Eisenschiml's Why and is based upon the O'Beirne papers (*in the exclusive possession of Eisenschiml*) and the records of The Metropolitan Police Department (Eisenschiml being the first and most exhaustive student thereof). Millard admitted that he had never consulted the O'Beirne Papers or the Police records, and therefore must have gotten the material and very language from Eisenschiml. (Plf. Sugg. Find. No. 73)

(gg) Internal evidence of other copying by Millard from Eisenschiml. (Plaintiff's Exhibits 27, 27A, 28, 29, 30, 31, 32)

778 (hh) Millard's ignorance of well-known historical facts with respect to the Civil War. (Plf. Sugg. Find. No. 74)

(ii) The lack of qualification, the bias, incorrect standards and wrong notions of defendant's expert, Dr. Ernest Samuels. (Plf. Sugg. Find. Nos. 79 to 88, both incl.)

(jj) Dr. Samuels' admission that when he first saw the so-called 66 quotes he was amazed by the similarity between Millard's article and Eisenschiml's books, but his opinion was changed by Defendant's Exhibit 4 of May 16, 1955. (Plf. Sugg. Find. Nos. 80 and 81)

(kk) The same elements which Dr. Samuels found in the Millard Article are also found in the Eisenschiml books—dreams, flights of fancy and excursions into the occult (Plf. Sugg. Find. No. 83); use of unexplained mysteries. (Plf. Sugg. Find. Nos. 84 and 85)

(ll) Dr. Samuels' admission that the Millard borrowings do not exceed 5000 words, or 20 to 25% of the article. (Plf. Sugg. Find. No. 86)

(mm) Dr. Samuels admitted many similarities of language and other similarities between the Millard article and the Eisenschiml books. (Plf. Sugg. Find. No. 88)

16. To the Special Master's certificate as to his services and requested fees.
Dated January 3, 1956

* * *

EXHIBIT "A" OF EXCEPTIONS

779 EXCERPTS FROM PLAINTIFF'S ATTORNEY'S LETTERS TO SPECIAL MASTER JOSEPH A. GRABER

(a) From letter dated July 15, 1955 (copy to J. B. Martineau):

> "We are sorry to interrupt your summer golf and rest by the enclosed carbon copy of the plaintiff's suggested findings of fact. We are sending a carbon copy instead of the original because there are some corrections to be made and some insertions of pages in the transcript. At the end of the summer, or earlier, we can exchange the original, fully corrected, for the enclosed carbon."

(b) From letter dated July 29, 1955 (copy to J. B. Martineau):

> "The other day we received the suggested findings of the defendant, to which the plaintiff has considerable objection. As I told you, in an earlier letter, I am going to be out of town until August 21st. Immediately upon my return I shall discuss with the defendant's attorneys the arrangements in connection with objections to our respective suggested findings, briefs, arguments, etc. I shall also at that time send you the remaining exhibits. You will recall that the most important ones are already in your hands, namely, the two Eisenschiml books, the issue of True Magazine, the plaintiff's affidavit for summary judgment, and the various demands for admissions and interrogatories, and the depositions."

(c) From letter dated September 1, 1955 (copy to J. B. Martineau):

"We await word from you after you return to the city. At that time I can exchange your carbon copy of our suggested findings for the original thereof, and I can also deliver to you plaintiff's exhibits. Certain of the exhibits are already in your possession or in the court files and I would like to know whether or not you prefer that I assemble all of them so they will not be scattered."

(d) From letter dated October 13, 1955 (copy to J. B. Martineau):

780 "We are eager to give you the original of the suggested findings which we sent to you in carbon copy some while ago. We are also eager to pick up the exhibits so that we may assemble them for you. Finally, we would like to know your wishes with respect to the insertions of the 70 additional parallels in the typewritten appendix filed by the defendant."

EXHIBIT "B"

781

PLAINTIFF'S SUGGESTED CONCLUSIONS OF LAW

(Filed Jan. 4, 1956)

(Parenthetical references are to paragraphs in Plaintiff's Suggested Findings of Fact. The references are not complete.)

(1) Plaintiff's said two books are original books, contain a large amount of material wholly original with him, and are copyrightable subject matter under the laws of the United States. (Pars. 4a, 8, 12, 16, 17, 18, 19, 25, 26, 29, 30, 65).

(2) While no one may claim copyright in historical facts or ideas, plaintiff may claim a copyright in the arrangement, presentation, analysis, interpretation, expression and language of such facts and ideas.

(3) Millard, and through him the defendant, had full, complete and continuous access to plaintiff's said two copyrighted books and used them extensively in connection with the writing of his article. (Par. 5, 4(a), 17).

(4) Neither defendant nor Millard ever requested or received permission to use any copyrighted portions of plaintiff's said two books in connection with the said article. (Par. 72).

782 (5) The defendant made no efforts prior to the publication of the Millard article to determine whether or not the article infringed any copyrights of plaintiff or anyone else. (Pars. 4g, 58, 59).

(6) The defendant is fully liable for any copyright infringements contained in the Millard article, despite any contractual or other relations or arrangements it may have had with Millard or others.

(7) The defendant is fully liable for any copyright infringements contained in the Millard article, despite any alleged custom or usage in the popular magazine field not to cite or credit sources. No such custom or usage was proved herein, and, in any event, it is irrelevant to the issues herein.

(8) The defendant is fully liable for any copyright infringements contained in the Millard article, despite the so-called popular nature of its magazine, True. A popular publication has no more right to infringe copyrights than any other publication.

(9) Millard's article contains substantially the same treatment of, and language about, Stanton (Pars. 49, 50), Lincoln (Pars. 48, 89), Booth (Pars. 48, 91), the Grants

(Par. 90), John F. Parker (Par. 92), O'Beirne (Par. 93), Miss Harris and Major Rathbone (Par. 94), John Fletcher (Par. 95) and Atzerodt (Par. 48) as in the Eisenschiml books, and the said named persons are the principal characters in the Millard article as in the infringed portion of the Eisenschiml books.

(10) Millard's article follows the same general outline or pattern as the plaintiff's said two books, and contains the same material, and treats such material in the same manner as does plaintiff. (Pars. 30 to 47, both incl.)

783 (11) In Plaintiff's book, Why Was Lincoln Murdered?, as in the Millard article, there is similar use of dreams, flights of fancy and excursions into the occult (Par. 83) and similar handling of the mysteries (Pars. 84, 85, 25, 26).

(12) The copying from the plaintiff in the Millard article is substantial in quantity and quality (Par. 86, 88, 68, 69, 70, 71, 73, 55, 56, 57, 63, 65, 67).

(13) Millard's article is a slavish imitation, paraphrase and copy of substantial portions of plaintiff's said two copyrighted books.

(14) Neither defendant nor Millard made "fair use" of the plaintiff's copyrighted books. On the contrary, their use of said books was unfair, unlawful and improper.

(15) The defendant, through Millard, substantially appropriated the research of plaintiff. (Pars. 25, 26 and elsewhere)

(16) Defendant infringed plaintiff's said copyrights by publishing and placing upon the market the February 1953 issue of its magazine, True, containing the book-length feature entitled America's Greatest Unsolved Murder, which was copied largely from plaintiff's said two copyrighted books. (Pars. 20, 21, 24 to 50, both incl., 53,

56, 57, 63, 65, 67 to 71, both incl., 73, 76, 77, 86, 88 to 95, both incl.)

(17) Dr. Ernest Samuels, called as an expert by defendant, was not qualified as such, had improper standards for judging copyright infringement, and his testimony did not tend to prove that defendant's article was not substantially copied from plaintiff's said two books. (Pars. 79 to 95, both incl.)

(18) The defendant should be required to respond more specifically and fully to the plaintiff's requests 784 for admissions and to the plaintiff's interrogatories. (Pars. 3 and 4).

(19) Defendant should bear the costs and fees occasioned by its original failure to admit the citizenship of defendant, and the amount thereof should be determined at the hearing on profits and damages which has been reserved herein (Par. 7).

(20) Defendant's Exhibit 3 of March 25, 1954, Defendant's Exhibit 7 of March 25, 1954, Defendant's Exhibits 3, 4, 8, 9, 12 and 13, Defendant's Exhibit 4 of May 16, 1955, and Defendant's Exhibits 1, 2 and 3 of May 27, 1955, are not admissible in evidence, none having any relevancy in proving any of the issues herein and each being inadmissible for the reasons, among others, set forth in Pars. 96, 97 and 98 of Plaintiff's Proposed Findings of Fact.

(21) Defendant should bear the costs and fees occasioned by its improper use of a mass display of almost wholly irrelevant books and other printed matter, a series of alleged source cards (Defendant's Exhibit 7 of March 25, 1954), and the compilation of alleged common sources (Defendant's Exhibit 4 of May 16, 1955), for the reason that these improperly lengthened and complicated the hearings herein, and the amount thereof should be determined at the hearing on profits and damages, which

has been reserved herein. (Pars. 80, 81, 96, 97b, 97h, 73).

(22) A decree should be entered herein as prayed in the complaint, and the couse should then be rereferred for hearing as to the costs, fees, damages, and profits.

* * *

785 * * *

786 PLAINTIFF'S SUGGESTED FINDINGS OF FACT

(filed January 4, 1956)

(1) Plaintiff Otto Eisenschiml's complaint herein against the defendant, Fawcett Publications, Inc., is in two counts: the one count alleging that the said defendant infringed the plaintiff's copyrighted book, Why Was Lincoln Murdered? (hereinafter sometimes referred to as Why?); the second count alleging that the said defendant infringed the plaintiff's copyrighted book, In the Shadow of Lincoln's Death (hereinafter sometimes referred to as Shadow); and both counts asking for injunctive relief, an accounting for profits, damages, attorney's fees and costs, all pursuant to the Copyright Act as Amended. The complaint has the usual jurisdictional and copyright infringement allegations; and, to the extent sustained by the record herein its allegations are set forth in detail hereinafter. The complaint was supplemented by plaintiff's motion for a summary judgment and plaintiff's affidavit in support thereof. (Introduced in evidence, without objection, as Plaintiff's Exhibit 7, Report of Proceedings, hereinafter called "Transcript", page 65.) To the extent sustained by the record herein, the allegations thereof are set forth in detail hereinafter. (Sometimes hereinafter Plaintiff's Exhibit 7 is described as Plaintiff's Affidavit.)

787 (2) By its answer to plaintiff's complaint, defendant (A) *Admits*:

a) That it is a corporation incorporated under the laws of the State of Delaware.

b) That this action arises under the copyright law of the United States.

(c) That it published an article entitled, America's Greatest Unsolved Murder in its February, 1953, issue of True Magazine.

d) That it received copies of the books Why Was Lincoln Murdered? and In the Shadow of Lincoln's Death from the plaintiff.

e) That it received notification from the plaintiff that it has infringed alleged copyrights of plaintiff.

(B) *Claims* it has neither sufficient information nor belief to answer certain allegations and demands strict proof thereof, and fails to answer or denies all of the remaining allegations of the complaint.

(3) Plaintiff served copies of his Requests for Admissions on defendant's attorneys on February 17, 1954, February 26, 1954, and September 7, 1954, respectively; the request served on the first mentioned date incorporating therein by reference the plaintiff's said affidavit in support of his motion for summary judgment. These were received in evidence, without objection, as plaintiff's exhibits 6, 7, 9 and 10 (Transcript pages 64, 65, 75-6, and 77-8). The defendant made partial responses to these requests under the dates March 1, 1954, March 8, 1954, and November 17, 1954, respectively, which partial responses were filed herein on or about the said dates and were marked for identification only as Plaintiff's Exhibits 6-A, 9-A and 10-A (Transcript pages 67, 76 and 78). In addition plaintiff served upon defendant's attorneys on February 18, 1954 interrogatories addressed to defendant (Transcript page 72). These, too, were received in evidence, without objection,

as Plaintiff's Exhibit 8. The defendant made partial answers to these interrogatories under date of March 1, 1954. These partial answers were marked for identification only as Plaintiff's Exhibit 8-A. (Transcript pages 72-73). The plaintiff asked, and asks, for rulings requiring the defendant to respond more specifically and fully to the plaintiff's said requests for admissions and interrogatories.

(4) For the purpose of this action only, the defendant made the following admissions and answers to the plaintiff's various requests for admissions and interrogatories:

(a) Exhibit "A", attached to affidavit of plaintiff in support of his motion for summary judgment, heretofore filed herein and received in evidence as Plaintiff's Exhibit 7, and by this reference made a part hereof, is a true and correct photostatic copy of pages 73 to 77, both inclusive, of a book-length article, entitled The Devil's Errand Boy, by J. J. Millard, which appeared in the July, 1947 issue of defendant's magazine True.

(b) Exhibit "C", attached to the said affidavit (Plaintiff's Exhibit 7), and by this reference made a part hereof, correctly sets forth in the first column thereof, under the words, True Magazine, passages from the book-length feature by Joseph Millard, which appeared in the February, 1953 issue of defendant's magazine True, and correctly sets forth in the second column thereof, under
789 the words Otto Eisenschiml, passages from plaintiff's books, Why Was Lincoln Murdered? and In the Shadow of Lincoln's Death.

(c) The document annexed to paragraph 24 of the said affidavit, and by this reference made a part hereof, is a true and correct photostatic copy of a genuine letter from Fawcett Publications, Inc., to Mr. Charles E. Mason, 224 Washington Street, Waukegan, Illinois, dated

February 27, 1953, which letter is signed by Ralph Daigh, Vice-president and Editorial Director of defendant.

(d) Plaintiff wrote said books, Why Was Lincoln Murdered? and In the Shadow of Lincoln's Death.

(e) Joseph Millard is the same person as J. J. Millard, and is the author of the article, America's Greatest Unsolved Murder.

(f) At all times since the publication of the July 1947 issue of True, Ralph Daigh was, and now is, Editorial Director of said magazine.

(g) The defendant never submitted the said article, (America's Greatest Unsolved Murder) to historians or authorities on the Lincoln assassination prior to its publication. A member of the editorial staff of the defendant suggested in writing that the defendant submit said article to a historian or authority on the Lincoln assassination prior to its publication. The said suggestion was read by Ralph C. Daigh prior to the publication of the said article, and ignored by him.

(h) Plaintiff delivered to defendant's counsel the article by Professor Paul H. Buck, referred to in Paragraph 12 of plaintiff's said affidavit (Plaintiff's Exhibit 7).

790 (i) Plaintiff has made the claims of infringement set forth in Paragraph 17 of the said affidavit.

(j) The February 1953 issue of defendant's publication True was sold to the public at 25¢ per copy. For the February 1953 issue of True there was a gross circulation of 1,898,285 copies, subject to returns and to a further breakdown of subscription and newsstand sales. The gross advertising revenue was $184,571.00 and the net was $156,865.85.

(k) The net paid circulation of True for the January 1953 issue was 1,824,292. The net paid circulation there-

of for the March 1953 issue was 1,709,205. The average net paid circulation thereof for the six-month period ending June 30, 1953 was 1,739,088. The average net paid circulation thereof for the six-month period ending December 31, 1953 was 1,789,970.

(l) The February 1953 issue of True went on sale on January 21, 1953. The off-sale date for the February 1953 issue of True was February 20, 1953.

(m) The article, America's Greatest Unsolved Murder, by J. J. Millard, was one of the features of the February 1953 issue of True.

(n) The source of each of the sixty-six items (hereinafter called "quotes") set forth in Exhibit "C" of plaintiff's said affidavit (Plaintiff's Exhibit 7), as far as defendant was concerned, was Joseph Millard, whom defendant describes as "the independent author" from whom it "purchased the article in question as a piece of merchandise for the sum of $1,850.00 on or about January 30, 1952."

(o) Defendant first saw said Millard article containing said information on or about the month of De-
791 cember, 1951. Defendant does not know when the author, Joseph Millard, first saw said items or their sources.

(p) Defendant contends that the matters set forth in Paragraph 19 of the said affidavit (Plaintiff's Exhibit 7) are matters of historical fact and as such are part of the public domain over which no one may assert any ownership.

(q) Defendant contends that the items set forth in Paragraph 20 of the said affidavit are "deductions, conclusions and speculations," which are not the subject of ownership by copyright or otherwise.

(r) Defendant does not know what "sensational discoveries" said Joseph Millard had reference to in the

quotation from his article of July 1947 set forth in Paragraph 11 of the said affidavit (Plaintiff's Exhibit 7).

(5) There is no issue as to the defendant's access to the plaintiff's said two copyrighted books. Joseph Millard, the author of the article in the February 1953 issue of defendant's magazine, True, admitted that he had read and was familiar with both books before writing the article. Millard admitted he had read both books at least twice and that Why was part of the preparation for his article. (Millard deposition, p. 202). His familiarity with the said two books is, also, indicated by what he wrote earlier in the July 1947 issue of defendant's said magazine. (Exhibit "A" attached to Plaintiff's Exhibit 7).

(6) It was stipulated and agreed by and between the parties hereto, without prejudice, that the issues of damages and profits would be reserved until the Court has passed on the issues of infringement.

(7) From birth Eisenschiml has been continuously, and now is, a citizen of the United States; and was, at the time of the filing of the complaint herein, a citizen 792 of the State of Illinois. At each of the times mentioned in Counts I and II of the complaint he was a citizen of the United States. (Plaintiff's Exhibit 17 for identification—copy of letter from Secretary of State, Transcript page 354, Transcript pages 435 ff, Transcript page 441, Plaintiff's Exhibit 21—copyright certificate for Why?) By its answer and at the outset of the hearings herein, defendant placed the plaintiff upon strict proof of his citizenship. But after plaintiff presented a large number of documents to prove his citizenship and had gone to a good deal of trouble and his counsel had stated for the record that he was going to ask for the taxing of costs and fees, defendant conceded the citizenship of plaintiff or that it did not matter because of the reciprocity with Austria.

(8) Prior to March 26, 1937, Eisenschiml created and wrote an original book, entitled Why Was Lincoln Murdered? This book contains a large amount of material wholly original with him and is copyrightable subject matter under the laws of the United States. (Testimony of Riddle, Transcript pages 230 to 228, both incl., 377 to 381, both incl., Testimony of Eisenschiml, Transcript pp. 312-321, and Testimony of Virginia Goldberg, Transcript pages 1 to 62, both incl., Plaintiff's Exhibit 21, Copyright Certificate, Exhibits "A" and "B" and pars. 12 and 13 of Plaintiff's Exhibit 7, Deposition of Millard, pp.).

(9) Between March 26, 1937 and March 27, 1937, Eisenschiml complied in all respects with the Act of March 4, 1909, as amended, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of the book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 27, 1937, Class A., No. 104467." Plaintiff's Exhibit 21—Copyright Certificate of Why?

793 (10) Since March 26, 1937, the book has been published by Eisenschiml and all copies of it made by him or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of March 4, 1909, as amended, and all other laws governing copyright. (Plaintiff's Exhibit 21—Copyright Certificate for Why?)

(11) Since March 26, 1937 Eisenschiml has been and still is the sole proprietor of all rights, title and interest in and to the copyright in said book. (Plaintiff's Exhibit 21—Copyright Certificate for Why?)

(12) Prior to September, 1940, Eisenschiml created and wrote an original book, entitled In The Shadow of Lincoln's Death. This book contains a large amount of

material wholly original with him and is copyrightable subject matter under the laws of the United States. (Testimony of Riddle, Transcript pages 230 to 238, both incl., 377 to 381 Testimony of Eisenschiml, Transcript pages 312 to 321, both incl., Testimony of Virginia Goldberg, Transcript pages 1 to 62, both incl., Plaintiff's Exhibit 22—Copyright Certificate for Shadow, Exhibits "A" and "B" and pars 12 and 13 of Plaintiff's Exhibit 7).

(13) Between September, 1940 and October 2, 1942, Eisenschiml complied in all respects with the Act of March 4, 1909, as amended, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of the book, and received from the Register of Copyrights a certificate of recording of assignment of copyright from the original holder of the copyright, dated and identified as follows: October 2, 1952, Class A, Book 492, page 112 (Plaintiff's Exhibit 22—Copyright Certificate).

794 (14) Since September 23, 1942, the book has been published by Eisenschiml and all copies of it made by him or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of March 4, 1909, as amended, and all other laws governing copyright. (Plaintiff's Exhibit 22—Copyright Certificate; Plaintiff's Exhibit 23—assignment of copyright).

(15) Since September 23, 1942, Eisenschiml has been and still is the sole proprietor of all rights, title and interest in and to the copyright in said book. (Plaintiff's Exhibit 22—Copyright Certificate, Plaintiff's Exhibit 23—Assignment of Copyright Certificate).

(16) The work Eisenschiml did on Why Was Lincoln Murdered? involved about 18 years and the expenditure of about $20,000.00, in addition to his own time. Some of

the manuscripts, books, magazines and newspapers Eisenschiml had to acquire were very expensive and rare and their acquisition required extensive correspondence and research. He had to acquire hundreds of photostats at considerable expense. For several years he paid wages to investigators in Washington, Brooklyn, Pittsburgh, Cleveland, Crawfordsville, Indiana, San Francisco, Macon, Ga., Burlington, Vermont, Chicago, and other places. A special secretary worked for him for about several years, and two-full-time assistants aided her for about one year prior to publication. Trips to various parts of the country cost additional money and time. The secretary and her mother, for example, were with him in Washington for some time, searching through the files of the Provost Marshal's office, and taking notes. The cash expenses for In The Shadow of Lincoln's Death amounted to about $3,000.00 in addition to his own time. (Testimony of Virginia Goldberg, Transcript pages 1 to 62, both incl., Testimony of Eisenschiml, pages 300 to 310, both incl., Plaintiff's Exhibit 5 for Identification, Plaintiff's Exhibit 18 for Identification, Plaintiff's Exhibit 19 for Identification, Exhibits "A" and "B" and pars. 12 and 13 of Plaintiff's Exhibit 7, Plaintiff's Exhibit 20, Plaintiff's Exhibit 1, pp. 487-8, and Plaintiff's Exhibit 2, page XI and XII).

17) The defendant, Fawcett Publications, Inc., published in the July, 1947 issue of its magazine True, a book or book-length article, entitled The Devil's Errand Boy, by J. J. Millard, the same person who is the author of a book, or book-length article, entitled America's Greatest Unsolved Murder, about which complaint is made in the instant proceedings. At the time of the publication by defendant of both the July 1947 and the February 1953 books or articles by Millard, Ralph Daigh

was Editorial Director of the defendant's said magazine, with general responsibility therefor. In the July 1947 book or article, the following words appear, at p. 74, with respect to the assassination of Abraham Lincoln: "To recount only the known facts about the assassination would fill volumes—and leave most of the important questions forever unanswered. Mr. Otto Eisenschiml of Chicago, the outstanding authority on Abraham Lincoln's death, has devoted a lifetime of intensive research on the subject. His two books—Why Was Lincoln Murdered? and In The Shadow of Lincoln's Death (sic)—are packed with his own sensational discoveries. . ." The said article then sums up a number of the findings, analyses and surmises from the said two Eisenschiml books. There is attached to Plaintiff's affidavit for summary judgment, marked Exhibit "A" and made a part thereof and

hereof by reference, photostatic copies of pages 73 to
796 77, both inclusive, of the said July 1947 article.
(*Admitted.*)

18) (Same as par. 12 of Plaintiff's Exhibit 7—Appendix pp. 20ff.)

(19) Eisenschiml offered to supply books, reviews, letters, statements, and affidavits by leading historians, setting forth similar expert opinions with respect to Eisenschiml and his said two books. Typical of informed opinion are the words of Dr. Paul M. Angle, which appear on pages 122-124 of his book, A Shelf of Lincoln Books (published in 1946 by Rutgers University Press in association with the Abraham Lincoln Association). Dr. Angle is Director

of the Chicago Historical Society, formerly secretary
797 of the Illinois State Historical Library, and formerly

secretary of the Abraham Lincoln Association, and author of several leading works on Lincoln. In the said book Dr. Angle wrote:

(Same as quoted language in Exhibit "B" of Plaintiff's Exhibit 7—Appendix pp. 36-9)

(20) After March 27, 1937, defendant infringed affiant's copyright by publishing and placing upon the market a book entitled America's Greatest Unsolved Murder, which was the principal feature of the February 1953 issue of True, a magazine published by defendant, and which was copied largely from Eisenschiml's copyrighted book, entitled Why Was Lincoln Murdered? (Plaintiff's Exhibits 1 and 3 and the other findings hereof).

(21) After September 23, 1942, defendant infringed affiant's copyright by publishing and placing upon the market a book entitled America's Greatest Unsolved Murder, which was the principal feature of the February 1953 issue of True, a magazine published by defendant, and which was copied largely from Eisenschiml's copyrighted book, entitled In The Shadow of Lincoln's Death. (Plaintiff's Exhibits 1, 2 and 3 and other findings hereof).

(22) Plaintiff in his complaint offered to produce copies of his copyrighted books and a copy of defendant's infringing books and magazine at such time or times as shall be required by the court. Prior to the filing of suit, he gave to defendant's counsel marked copies of his said two books and filed other marked copies with his motion and affidavit for summary judgment.

(23) Prior to filing his suit, plaintiff notified defendant that defendant had infringed the copyrights of plaintiff, and defendant has continued to infringe the copyrights. Plaintiff, through Elmer Gertz, his attorney, wrote to defendant by air mail registered (return receipt requested) under date of March 12, 1953 and the said letter was
799 received by the defendant. (Plaintiff's Exhibit 24). This letter advised defendant that the Millard article, its substance, style and language, were derived from Eisen-

schiml's said two books. Notwithstanding this letter, defendant continued to sell copies of the issue of True containing the Millard article and advertised it on the front cover of the issue of January 1954 (Plaintiff's Exhibit 25), where facsimiles of the previous year's issue of True are displayed, with the infringing issue at the head of the page.

(24) Plaintiff prepared a compilation of parallel passages from his books and the Millard article, marked Exhibit "C", attached it to his Affidavit for Summary Judgment and made it a part thereof and of these findings by reference; said Exhibit "C" sets forth in the first column, under the words True Magazine, passages from the infringing book or book-length article published by defendants in the February 1953 issue of its magazine True, and sets forth in its second column, under the words "Otto Eisenschiml", passages from the plaintiff's said two copyrighted books, copied by defendant.

(25) The following is a summary of the new factual material or new interpretation of older material presented for the first time in plaintiff's two said copyrighted books, all of which was copied by defendant (Testimony of Riddle, Transcript pages 230 to 238, both incl.; Testimony of Eisenschiml, Transcript pages 312 to 321, both incl.)

(a) That there was a mystery about Lincoln's death; (This is tied in generally with Millard's article and the plaintiff's book, Why? Testimony of Eisenschiml Transcript p. 331).

(b) That Parker was a key figure (his background, which Eisenschiml disclosed, had never before been 800 laid bare); (this is tied in with quotes 13, 14, 15, 21, 34 and 34-A. Testimony of Riddle, Transcript p. 232; Testimony of Eisenschiml, Transcript p. 332.)

(c) That Mrs. Lincoln was responsible for Parker's appointment, and therefore could be, by a stretch of the im-

agination, said to have been under suspicion; (this is tied in with quote 15; Testimony of Eisenschiml, Transcript p. 318).

(d) That reports of Lincoln's death had been reported in various papers prior to the tragedy, giving examples; (this is tied in with quotes 1 and 3; Testimony of Eisenschiml, Transcript pp. 332, 321)

(e) The advertisements in the Washington newspapers, from which Millard drew his description, never had been reprinted (and Millard admitted he had never seen a reproduction, deposition p. 130) before, so far as known;

(This is tied in with quote 62;

Testimony of Eisenschiml, Transcript pp. 337, 319;

Testimony of Riddle, Transcript pp. 236-237.)

(f) The significance of the note which was handed to Grant at the White House on April 14, 1865; (This is tied in with Why, middle of page 61, and True, page 105, Col. II, paragraph 5.)

(g) The curious fact of Grant's evasiveness in his Memoirs;

(This is tied in with quotes 4, 5 and 6. Millard admitted that this was called first to his attention by Eisenschiml (Millard deposition, p. 467) and that he used it in his work (p. 468).

(Testimony of Eisenschiml, Transcript p. 335;

(Testimony of Riddle, Transcript, p. 234).

801 (h) Proof that Grant's excuse for leaving Washington was unfounded; (This is tied in with Quotes 5 and 6. Millard admitted that this was first brought to light and called to his attention by Eisenschiml (Millard deposition, pp. 467, 470).

(Testimony of Eisenschiml, Transcript pp. 335, 314.

(Testimony of Riddle, Transcript p. 234).

(i) Time-table showing that Grant gained practically nothing by taking an early evening train; (This is tied in

with Quote 7. Millard admitted that this was first brought to light or called to his attention by Eisenschiml. (Millard deposition pp. 467, 472).

(Testimony of Eisenschiml, Transcript, pp. 335, 314;
(Testimony of Riddle, Transcript, p. 234).

(j) The significance of Stanton's refusal to have Eckert act as Lincoln't bodyguard; (This is tied in with Quotes 9, 10 and 11)).

(k) Stanton's false oath about Lincoln not being at the War Department on April 14, 1865; (This is tied in with Quote 10.

(Testimony of Eisenschiml, Transcript pp. 334, 313.
(Testimony of Riddle, Transcript p. 233.)

(l) Stanton's and Eckert's false statements that they were busy at the War Department on the fatal night; (This is tied in with Quotes 9, 10 and 11.

(Testimony of Eisenschiml, Transcript pp. 333, 313.
(Testimony of Riddle, Transcript p. 233).

(m) The strange behavior of the editor Hanscom, and of the valet Forbes; (This is tied in with Quote 19.

(Testimony of Eisenschiml, Transcript p. 332;
(Testimony of Riddle, Transcript p. 232).

802 (n) The contradictory and evasive statements of Major Rathbone and Miss Harris; (This is tied in with Quote 22. Millard admitted that this was first brought to light or called to his attention by Eisenschiml (Millard deposition pp. 467, 473, 474).

(Testimony of Eisenschiml, Transcript pp. 333, 313;
(Testimony of Riddle, Transcript p. 232).

(o) The two divergent statements of McGowan; (This is tied in with Quote 20).

(p) The statement of the coachman Burns that he had taken Parker and Forbes for a drink; (This is tied in with Quote 21).

(q) The exact time when Booth fired his shots; (This is tied in with Quote 64.)

(Testimony of Riddle, Transcript p. 238;

(Testimony of Eisenschiml, Transcript p. 321).

(r) The fantastic clues left in Atzerodt's room; (This is tied in with Why, p. 168, and True, p. 112, Col. I, second half, Col. II, par. 3.

(Testimony of Eisenschiml, Transcript, pp. 338, 316;

(Testimony of Riddle, Transcript, p. 236).

(s) The contradictory stories of the livery man Fletcher, and the perversion of his testimony by the official recorder of the assassination trial; (This is tied in with Quotes 24 and 25).

(t) The wilful changes made in the official record of the trial made by Pitman and Judge Advocate Burnett; (This is tied in with Quote 23. Millard admitted that this was first brought to light and called to his attention by Eisenschiml (Millard deposition pp. 467, 474).

803 (Testimony of Riddle, Transcript p. 236;

(Testimony of Eisenschiml, Transcript p. 316).

(u) The fact that the pursuit of Booth was not undertaken in the right direction, and that the War Department neglected to follow Booth's trail after Fletcher's report; (This is tied in with Quotes 25, 26, 27, 32 and 43. Millard admitted that this was first brought to light or called to his attention by Eisenschiml (Millard deposition, pp. 467, 477, 479, 480).

(Testimony of Eisenschiml, Transcript pp. 337, 316;

(Testimony of Riddle, Transcript p. 236).

(v) The fact that the blotter of the 10th Street Police Station in Washington contained the names of witnesses and their statements; (This is tied in with Quote 24. Millard admitted that this was first called to his attention by Eisenschiml and that he has never seen the blotter (Millard deposition pp. 467, 481).

(Testimony of Eisenschiml, Transcript pp. 337, 321;
(Testimony of Riddle, Transcript p. 237).

(w) Captain Gleason's part in the story—that he knew where Booth had gone, but was refused cavalry, and was detained at headquarters:

(This is tied in with Quote 26;
(Testimony of Riddle, Transcript p. 236;
(Testimony of Eisenschiml, p. 316)

(x) The significance to Stanton's delay in broadcasting Booth's name until too late to reach the morning editions;

(This is tied in with Quote 28: Millard admits that this was first brought to light or called to his attention by Eisenschiml (Millard deposition pp. 467, 482, 484).

804 (Testimony of Eisenschiml, Transcript pp. 336, 314;
(Testimony of Riddle, Transcript pp. 234, 235).

(y) Proof that Stanton knew the identity of the assassin all along; (This is tied in to Quote 38);

(Testimony of Eisenschiml, Transcript pp. 335, 314;
(Testimony of Riddle, Transcript p. 234).

(z) When the Southern newspapers received the news of the tragedy; (This is tied in to Quote 28;

(Testimony of Eisenschiml, Transcript pp. 336, 314; 321;
(Testimony of Riddle, Transcript, p. 235).

(aa) The strange behavior of Gobright of the Associated Press; (This is tied in to Quotes 29 and 30;

(Testimony of Eisenschiml, Transcript pp. 336, 314;
(Testimony of Riddle, Transcript, p. 235).

(bb) The significance of the wire disturbance out of Washington during the crucial hours of the night, and Eckert's testimony in regard to it;

(This is tied in to Quote 31;
(Testimony of Eisenschiml, Transcript pp. 336, 315;
(Testimony of Riddle, Transcript pp. 235, 236).

(cc) How the pursuit of Booth was organized;

(This is tied in to Quote 32.

(Testimony of Riddle, Transcript p. 236;

(Testimony of Eisenschiml, Transcript p. 316).

(dd) The reasons for the premature arrest of Arnold and O'Laughlin;

(This is tied in to Quote 38).

(ee) The entire O'Beirne story, based on his private papers and his diary, inaccessible to anyone but Eisenschiml;

(This is tied in to Quote 35;

(Testimony of Riddle, Transcript 236;

(Testimony of Eisenschiml, Transcript p. 317).

(Admission by Millard—deposition p. 356).

805 (ff) (Withdrawn).

(gg) That the "tobacco barn" at Garrett's farm had more than one door;

(This is tied in to Quotes 50 and 51. Millard admitted that this was first brought to light or called to his attention by Eisenschiml. (Millard deposition pp. 467, 485)).

(hh) Lafayette C. Baker's determination to catch Booth, or substitute another body for it;

(This is tied in to Quote 53. Millard admitted that this was first brought to light or called to his attention by Eisenschiml. (Millard deposition, pp. 467, 489, 491)).

(ii) Lafayette Baker's interferences with the Dry Tortugas authorities to insure isolation and silence of the imprisoned "conspirators."

(This is tied in to Quote 55).

(26) The following is a summary of the deductions, inductions, conclusions and speculations presented for the first time in plaintiff's two said copyrighted books, all of which were copied by defendant.

(Testimony of Riddle, Transcript pp. 230 to 238, both incl.

(Testimony of Eisenschiml, Transcript, pp. 312 to 321, both incl.)

(a) That the conventional story of Lincoln's assassination is inaccurate, and that efforts were made to becloud it;

(This is implicit in Millard's entire article and all of plaintiff's Why.

(Riddle says this is so "without qualifications." (Transcript p. 1085). Eisenschiml testified: "That is really the contents of my book." (Transcript, pp. 1517, 1518).

806 (b) That the conspiracy was much more widespread than generally accepted, and pointed to Stanton.

(This is implicit in Millard's entire article and all of plaintiff's Why; It was testified to by Riddle (Transcript p. 1084) and Eisenschiml (Transcript p. 1468)

(Testimony of Riddle, Transcript p. 231;

(Testimony of Eisenschiml, Transcript pp. 231 and 331).

(c) That the Radicals and Stanton stood to gain much by Lincoln's death, and why;

(This is tied in to Why, p. 37 and True, pp. 105, Col. I, paragraph 5 from bottom. It was testified to by Eisenschiml (Transcript p. 1518).

(d) That Booth was being protected by some high personage, and why his road of escape was known and kept open.

(This is tied in to Why, p. 91, and True, p. 114, Col. II, top and p. 115, Col. II, bottom.

Testimony of Eisenschiml, Transcript pp. 314, 315).

(e) Why those who wanted to pursue Booth and knew where he had gone were prevented from following him, and why the organized pursuit was intentionally misdirected;

(This is tied in to Quotes 32 and 36 and the same passages as in (d) hereinabove. This was testified to by Eisenschiml (Transcript pp. 1535, 1536, 1541);

(Testimony of Riddle, Transcript p. 236).

(f) Why the wires out of Washington went out of commission during the night of April 14, 1865;

(This is tied in to Quote 31.

807 (This was testified by Eisenschiml (Transcript pp. 336, 315, 1542 to 1552, both incl.) and by Riddle (Transcript pp. 235-6, p. 1041).

(g) Why the news of the assassination was not allowed to reach Richmond and other Southern cities until it could be assumed that Booth had passed beyond them;

(This is tied in partly to Quote 28 (Why, pp. 65, 66, 67, 90, True, p. 115, Col. I, par. 4). This was admitted by Millard (deposition p. 378).

(Testimony of Eisenschiml, Transcript 336;

(Testimony of Riddle, Transcript p. 285).

(h) Why the correspondent of the Associated Press suppressed a telegram which had preceded the interrupted wire service;

(This is tied in to Why, p. 75 and True p. 115 center.

(Testimony of Eisenschiml, Transcript p. 336;

(Testimony of Riddle, Transcript p. 235).

(i) Why the record of the conspiracy trial was deliberately doctored up;

(This is tied in partly to Quote 23 (Why, page 115, bottom, and True page 114, Col. I, bottom) This was admitted by Millard (deposition p. 378, 63, 474).

(Testimony of Riddle, Transcript p. 236).

(j) Why the government was interested only in punishing those conspirators who were suspected of having been in Booth's confidence, while all others were ignored;

(This is tied in partly to Quote 49 (Why, page 304, and True, page 118, Col. I, paragraphs 4 and 5). This was admitted by Millard (depositions p. 378) and testified to by Riddle (Transcript p. 1077) Testimony of Eisenschiml, Transcript p. 320).

808 (k) Why Grant did not tell the truth when he gave his reason for leaving Washington on April 14, 1865;

(This is tied in partly to Quotes 4, 5 and 6.
(Why, p. 56, and True, p. 105, center;
(Testimony of Eisenschiml, Transcript pp. 335, 314;
(Testimony of Riddle, Transcript p. 234).

(l) The significance of Parker staying on the Police force until Stanton was removed from office, and why their dismissals occurred almost simultaneously;

(This is tied in partly to Quote 34A
(Why, p. 19, and True, p. 117, Col. I, center)
(This was admitted by Millard (deposition p. 378) and testified to by Riddle (Transcript p. 1079);
(Testimony of Riddle, Transcript p. 237;
(Testimony of Eisenschiml, Transcript p. 320).

(m) The implication in the premature arrest of Arnold and O'Laughlin, indicating that the identity of the conspirators was known, and that those who might have been in Booth's confidence had to be silenced quickly;

(This is tied in partly to Quote 38.
(Why, page 48, and True, page 117, Cols. I and II)).

(n) The significance of Stanton's refusal to let Eckert act as Lincoln's bodyguard that night;

(This is tied in partly to Quotes 9, 19, 11 and 12
(Why, pp. 37, 38, and True, pp. 106. Col. I bottom, Col. II top)).

(o) The interpretation of Booth's exclamation to Lloyd that they had murdered Lincoln and Seward, indicating that no other murders had been contemplated.

(This is tied in partly to Quote 33 (Why page 171, 809 and True, page 116, Col. I, par. 5 from bottom).

(27) (a) Why Was Lincoln Murdered? Plaintiff's Exhibit 1, is a book of more than 500 pages, written and copyrighted by the plaintiff, Otto Eisenschiml, and published by Little, Brown and Company in March 1937 (the year of copyright). Immediately under the copyright notice the following language is printed in capital letters throughout: "All rights reserved, including the right to reproduce this book or portions thereof in any form." At the end of the page, these words appear also in capital letters: "Printed in the United States of America."

(b) The book has twenty-nine chapters plus a foreword (under the title "Smudges"), a Conclusion, Supplemental Notes, Acknowledgments, an Index and many Illustrations, including Reproductions of Documents, at End of Book.

(c) On the following pages of the book as received in evidence, there are underscorings and markings in the pencilled handwriting of the plaintiff: 11 to 14, both incl., 16, 17, 19, 23, 24, 25, 26, 27, 29, 34, 35, 37, 38, 49, 56, 57, 58, 59, 65, 66, 68, 73, 75, 78, 79, 84, 85, 91, 110, 111, 112, 113, 114, 120, 122, 123, 171, 184, 230, 231, 447, 448. There are numerals in the same handwriting in the margins of the said pages; these refer by number to the items or quotations or quotes similarly numbered, in Exhibit "C" of the Plaintiff's Affidavit in Support of his Motion for Summary Judgment (Plaintiff's Exhibit 7); namely: Nos. 4 to 36, both incl. (including 34-A), 38, 39, 43 to 49, both incl., 54 to 57, both incl., 59 to 63, both incl., 65 and 66

(*fifty-four in all*). (The other items or quotations of Exhibit "C"—namely, 1, 2, 3, 37, 40, 41, 42, 50, 51, 52,
810 53, 58 and 64—thirteen in all—pertain to In the Shadow of Lincoln's Death, Plaintiff's Exhibit 2.) The passages in question are keyed to passages on pages 37, 104, 105, 106, 108, 109, 110, 112, 114, 115, 116, 117, 118, 119 and 120 of the Millard article (Plaintiff's Exhibit 3).

(d) The parallel passages, thus numbered, are among those claimed by the plaintiff to be copied by defendant from plaintiff's said copyrighted books. Those are not the only claimed infringements. First of all, there is the over-all plagiarism, described in Plaintiff's Exhibit 20 and in the testimony of the plaintiff and summarized hereinafter. Then there are the instances of copying testified to by the expert witness, Dr. Donald W. Riddle. (The Riddle testimony and exhibits are more fully analyzed hereinafter.) Then there are the examples of plagiarism enumerated in paragraphs 18, 19 and 20 and Exhibit "C" of the Plaintiff's Affidavit in Support of his Motion for Summary Judgment (Plaintiff's Exhibit 7). These are set forth, in part, as findings 25 and 26 hereinabove.

(e) Among the more important claimed instances of copying by the defendant are seven entire chapters; namely, Chapter 111 ("The Strange Career of John F. Parker," pages 11 to 21, both incl.), Chapter IV ("What Really Happened at Ford's Theatre", pages 22 to 31, both inclusive), Chapter V ("The President Is Refused Protection," pp. 32 to 39, both incl.), Chapter VII ("Grant Suddenly Leaves Washington," pages 54 to 64, both incl.), Chapter VIII ("How News of the Tragedy Was Handled," pages 65 to 90, both incl.), Chapter IX ("John Fletcher Tells His Story," pages 107 to 115, both incl.), and Chapter XII ("Baker Directs the Pursuit," page 116 to 129, both incl.).

811 (f) Some of the illustrations which are the basis of claimed infringements by the defendant are on pages 15, 60, 82, 84, 86, 92, 112, 113, and elsewhere, including Nos. 3 and 4 and 12 of the Documents at the End of the Book.

(g) The various claimed infringements are summarized and analyzed hereinafter.

(h) At the bottom of the various pages of the book, there are foot-note references to the original sources for some of the statements made by the author in his book, such as manuscripts in public and private depositories, newspapers, periodicals, pamphlets, reports, books, etc., etc., some rare and difficult to get and scattered in various places throughout the country. Some of the foot-notes indicate that the originals are in the possession of Eisenschiml. These include pages 14 and 15 (the O'Beirne papers), 84 (various newspapers), 120, 123, 128, etc., etc. Some of the foot-notes include acknowledgments to the copyright owners of the books used or those holding possession of the documents consulted, as for examples, pages 23, 39, 71, 87, etc. Some of the footnotes indicate when the italics are Eisenschiml's, as for example, page 114.

(i) In some instances, as for example, the Camden & Amboy Railroad time-table—page 56, the fact that Eisenschiml has exclusive knowledge of the facts or possession of the material, is not indicated.

(j) In the Acknowledgments (on page 487-8, both incl.) Eisenschiml says: "In the preparation of this book I have received help from many people to whom I am greatly indebted." He then lists a number of such persons, including Paul M. Angle, Lloyd Lewis, David Rankin Barbee, F. Lauriston Bullard, Clara E. Laughlin, Luther H. Baker. Among the acknowledgments is one
812 which reads: "To the late John H. Dern, Secretary

of War, who permitted the publication of material found in the files of his department." Another one reads: "To Miss Virginia Maier, who has devoted her entire time for years to historical research, and who has been a vital factor in the completion of the volume." (Miss Maier is now Mrs. Goldberg, the first witness called by the plaintiff).

(28) (a) In the Shadow of Lincoln's Death, Plaintiff's Exhibit 2, is a book of more than 415 pages, written by the plaintiff, Otto Eisenschiml, and published and copyrighted originally by Wilfred Funk, Inc., in 1940. Subsequently, the copyright was assigned to the plaintiff (Plaintiff's Exhibit 22). On the same page as the usual copyright notice appears these words: "Printed in the United States of America." On the last page of the book appears these words: "Printed by the Cornwall Press, Inc. Cornwall, N. Y. Bound by J. F. Tayley Company, Long Island, N. Y."

(b) The book has fourteen chapters, acknowledgments, Notes (at the rear of the book, pages 371 to 404, both incl.) and illustrations.

(c) On the following pages of the book as received in evidence there are underscorings and markings in the pencilled handwriting of the plaintiff: 5, 8, 9, 25, 26, 55, 70, 71, 73, 74, 91, 351. There are numerals in the same handwriting in the margins of the said pages; these refer by number to the items or quotations or quotes, similarly numbered, in Exhibit "C" of the Plaintiff's Affidavit in Support of his Motion for Summary Judgment (Plaintiff's Exhibit 7); namely, Nos. 1, 2, 3, 37, 40, 41, 42, 50, 51, 52, 53, 58 and 64—thirteen in all. (The other fifty-four underscored passages are in Why Was Lincoln Murdered?, Plaintiff's Exhibit 1). The passages in question are 813 keyed to passages on pages 36, 37, 119, 116, 105, 107, 118, 119, 106 and 111 of the Millard article (Plaintiff's Exhibit 3).

(d) The parallel passages, thus numbered, are among those claimed by the plaintiff to be copied by defendant from plaintiff's said copyrighted book. Those are not the only claimed infringements. (See the references thereto in the note in connection with Plaintiff's Exhibit 1—finding 27 (d) hereinabove).

(e) Among the more important claimed instances of copying by the defendant are: Chapter I ("Lincoln Had Some Narrow Escapes," page 3-21, both incl.), Chapter II ("Vox Populi,", pages 25-30, both incl.), portions of Chapter IV ("Did John Wilkes Booth Escape?", pages 53-88, both incl.), Part I of Chapter XIV ("Problems Solved and Unsolved—When Was Lincoln Shot?"—pages 351 to 353, both incl.).

(f) The various claimed infringements are summarized and analyzed elsewhere.

(g) In the text of the various pages of the book, there are reference numbers in small type to the various sources for some of the statements made by the author in his book. By turning to the appropriate place in the Notes in the back of the book, one can determine the original sources consulted by the author.

(h) In the Acknowledgments (on pages XI and XII of his book) the author lists a large number of people and institutions to whom he is indebted, including some of those referred to in the testimony of Virginia Goldberg, formerly Virginia Maier. He makes acknowledgment to her "for her untiring cooperation in collecting, assembling and evaluating the historical data used in this volume."

814 (29) Why Was Lincoln Murdered? is essentially different from all previous accounts of Lincoln's assassination. The earlier books were conventional accounts largely in narrative form. They dealt with no

mysteries, asked no questions, had no surmises or inferences, and were based on familiar factual material. Eisenschiml's book reopens the supposedly closed chapter of Lincoln's death by disclosing many new facts, discovered by Eisenschiml, and, what is equally important, it dovetails them with known facts into a new and consistent pattern, which forms the main implied thesis—that the crime was not, as heretofore assumed, the deed of a halferazed actor acting on his own behalf, but the result of a conspiracy, in which high Washington officials were involved, possibly Secretary of War Stanton included. The book also points out many other heretofore overlooked mysteries, some of which remain unexplained. Prior to the publication of Eisenschiml's book, no suspicion on these various matters had been voiced by any historical writer. The main thesis was then supplemented by Eisenschiml's second book, In the Shadow of Lincoln's Death. In both books, unlike the earlier Lincoln assassination books, questions are asked, inferences, surmises and conclusions reached. The Eisenschiml books, while based upon sound scholarship and factual, are also full of mystery, suspense, and excitement (Plaintiff's Exhibits 1, 2, and 20, Exhibits A and B attached to Plaintiff's Exhibit 7, Eisenschiml testimony Riddle testimony).

(30) Eisenschiml's book, Why Was Lincoln Murdered? begins with a one-page foreword, under the title, Smudges, which sets the tone of the entire book—and Millard's article. He tells of the dark smudge found by a chemist on a photographic plate. The chemist's inquisitive pursuit of an explanation led to the discovery of radium. Eisenschiml goes on to say:

815 "Historians, in developing the story of Lincoln's assassination, have encountered smudges equally baffling. Why did General Grant suddenly alter his

plans and decide not to go to Ford's Theater on the evening of Lincoln's assassination? Who, during that same night, tampered with the telegraph wires leading out of Washington? Why was the President's bodyguard at the playhouse, guilty of the grossest negligence, not punished nor even questioned?

"Perhaps the most serious reproach against historical writers is not that they have left such questions unanswered, but that they have failed to ask them."

(b) It is to be noted that these questions, asked for the first time by Eisenschiml and developed in his book, are likewise asked by Millard in his article and developed in the self same way that Eisenschiml develops them. (Quotes 1 to 16, both incl., 31, 34, 34A. This is the heart of the Eisenschiml book and the Millard article.

(c) What immediately follows under paragraphs numbered 31 to 42 are summaries of chapters from Why Was Lincoln Murdered? and a general indication of the overall copying of each chapter by Millard. For a detailed step-by-step demonstration of the over-all copying, one should read the Quotes referred to in each instance, the material indicated in Millard's deposition, and then the other references listed at the head of each chapter summary.

(31) (a) Chapter III. The Strange Career of John F. Parker. (Pages 11-21, both inclusive, of Plaintiff's Exhibit 1, pages 108, 109, 117 of Millard's article—Plaintiff's Exhibit 3, Plaintiff's Exhibit 20, pp. 2-3; Quotes 13, 14, 15, 21, 34, 34A, Eisenschiml testimony—transcript; Millard deposition, pages 235, 236, 239).

816 (b) The chapter recites the career of an incompetent and dissolute policeman named John F. Parker, who was Lincoln's bodyguard on the fatal night, and how

he happened to be appointed through a letter written by Mrs. Lincoln to a provost marshal named O'Beirne. It takes the story from his birth on May 19, 1830, through his career as carpenter, his enlistment in the Army, his joining the Metropolitan Police Force, his family, his bad record on the Police Force, his appearances before the Police Board, the details of his various misadventures, the Mrs. Lincoln letter and her endorsement with respect to Parker's draft exemption, the drink with the coachman Burns, what Parker did on the night of the assassination and the morning after, his subsequent police career and misadventures, the minor nature of his last offense and its leading to his dismissal; Secretary of War Stanton meanwhile having been ousted.

(c) Millard, at the pages and in the places indicated, follows the Parker story as given by Eisenschiml in the latter's copyrighted narrative form. He has the same facts, the same inferences and questions, and generally a close paraphrase and near-identity of language. Although his sequence of incidents is sometimes a bit different from Eisenschiml's, his build-up of the story closely parallels Eisenschiml's. All of this lends color, interest and excitement to the Millard story.

(32) (a) Chapter IV. What Really Happened at Ford's Theater. (Pages 22-31, both incl., of Plaintiff's Exhibit 1, pages 109, 110 of Millard's article—Plaintiff's Exhibit 3; Plaintiff's Exhibit 20, pp. 3-4; Quotes 16, 17, 18, 19, 20, 22; Eisenschiml's testimony, transcript; Millard deposition, pages 63, 473, 474).

817 (b) The chapter shows that the accepted version of what happened in the President's box at Ford's Theater, prior to the assassination, was wrong. Eisenschiml shows that five, and not four, persons were in the box; the fifth person being Lincoln's valet Charles Forbes.

He proves this through a theretofore unpublished statement by Forbes and an unknown account by a journalist named Hanscom, the latter account being substantiated by Eisenschiml through statements of witnesses, including Lieutenant Crawford and Captain McGowan. Eisenschiml then points out the variations and contradictions of two different statements made by three witnesses—Miss Harris, Major Rathbone and Capt. McGowan. Some of the statements had been unknown; others had not been properly evaluated. Eisenschiml's evaluation leads him to the suspicion that these witnesses had been influenced by the War Department to omit certain portions of their original statements. He makes observations and inferences with respect thereto.

(c) Millard appropriates the Forbes statement verbatim and copies from the statements of Miss Harris and Major Rathbone in the manner of Eisenschiml and uses Eisenschiml's surmises and inferences as to the statements of the said four persons.

(33) (a) Chapter V. The President is Refused Protection. (Pages 32-39, both incl., of Plaintiff's Exhibit 1, pages 36 and 106 of Millard's article—Plaintiff's Exhibit 3; Plaintiff's Exhibit 20, pp. 4-5; Quotes 9, 10, 11, 12, Eisenschiml testimony—transcript; Millard deposition).

818 (b) Here Eisenschiml investigates Stanton's refusal to allow Major Eckert to accompany Lincoln to the theatre, and uncovers the falsity of the statements by Stanton and Eckert as to what they intended to do that night. He further points out Stanton's perjury about the time of Lincoln's last visit to the War Department and asks questions and makes inferences and conclusions with respect thereto. He shows how little was actually done at the War Department that night, digs out the only three wires that were received, and tells of what Stanton and Eckert actually did.

(c) Millard follows Eisenschiml's story as here outlined, adopting Eisenschiml's incidents, manner of proof, inferences, conclusions, and much of his language. He adopts Eisenschiml's implication of Stanton's complicity by printing a picture of Stanton with the caption: "Why did he refuse Lincoln the guard he asked for?" All of this heightens the interest, the suspense of Millard's story, in the same fashion as employed by Eisenschiml.

(34) (a) Chapter VI. Premonitions vs. Secret Service Reports. (Pages 40-53, both incl., of Plaintiff's Exhibit 1, page 117 and other spots in Millard's article—Plaintiff's Exhibit 3, Plaintiff's Exhibit 20, p. 5, Quote 38, Eisenschiml testimony—transcript; Millard deposition, Riddle testimony.

(b) Eisenschiml deals with the premonition of approaching tragedy, Lincoln's forebodings and superstitions, his dreams, the recollection of Crook, the threatening letters, the plots, the rumors, the attempted kidnapping, etc., all in the manner later used by Millard to lend color to his article; all leading to the climactic point, 819 borrowed by Millard, that the War Department had known the identity of the conspirators for several weeks prior to the assassination, but had taken no action against them, had not even kept them under surveillance. Eisenschiml's proof is a letter by Robert G. Mowry, which he discovered and which shows that the "Sam letter", generally accepted as the means which identified Sam Arnold, one of the conspirators, and led to his premature arrest, did not in fact have that effect. Eisenschiml shows that the assumption is wrong. Millard repeats all this, following Eisenschiml in his discoveries and inferences.

(35) (a) Chapter VII. Grant Suddenly Leaves Washington. (Pages 54-64, both incl., of Plaintiff's Exhibit 1, page 105 of Millard's article—Plaintiff's Exhibit 3,

Plaintiff's Exhibit 20, pp. 5-6, Quotes 4, 5, 6, 7; Eisenschiml testimony—transcript; Millard deposition, pp. 468, 437, 438, 35, 318).

(b) This chapter tells of the Lincolns inviting the Grants to join them at Ford's Theatre, the General's acceptance, followed by his abrupt departure from Washington. Eisenschiml shows that Grant's own version of why he stood up Lincoln that night was a fabrication, because, according to a time-table unearthed by Eisenschiml after nine months of investigation, he could have reached his children by an early morning train almost as quickly as by the night train he took. Eisenschiml also questions his anxiety to see his children, from some of whom he had not been away very long. He points out that had Grant been present in the box, Booth's plot could not have been carried out. He tells of how Mrs. Grant, a woman of education and refinement, had been subjected to humiliation by Mr. Lincoln, and speculates that this was the reason for Grant to run out on the engagement.

820 (c) Millard copies everything in this chapter, including the train schedules and the various suspicions and surmises.

(36) (a) Chapter VIII. How the News of the Tragedy Was Handled. (Pages 65-90, both incl., of Plaintiff's Exhibit 1; pages 114, 115 of Millard's article—Plaintiff's Exhibit 3; Plaintiff's Exhibit 20, pp. 6-7; Quotes 28, 29, 31; Plaintiff's Exhibit 31, Eisenschiml testimony pp. 1242-43-44; Millard deposition, pp. 482-84, 323, 321).

(b) Eisenschiml shows for the first time that the news of the tragedy and the name of the assassin were wilfully withheld from the press until the time for the first morning edition had passed; and that wherever this was impossible, the papers were kept from printing the truth. He tells of the strange behavior of L. A. Gobright, the

Washington agent of the Associated Press. He tells of the police blotter and the seventeen persons who appeared at headquarters and identified Booth as the murderer. He shows how the interruption of the wire service at the critical hours was an inside job, and wonders why no efforts were made to investigate it. He shows, by example and induction, that the Southern papers were very tardily advised of the news, or were not allowed to print it at once. The implication of these facts, he demonstrates, is that Booth was to be given time to get safely beyond reach of successful pursuit. (c) Millard parallels this chapter with all of its inferences. He cites only the Southern papers which Eisenschiml cites, although, admittedly, he had seen none of the papers himself.

(37) (a) Chapter IX. Every Avenue of Escape Blocked —Save One. (Pages 91-96, both incl., of Plaintiff's Exhibit 1, pages 115, 116 of Millard's article—Plaintiff's Exhibit 3; Plaintiff's Exhibit 20, p. 7, Quote 32, Eisenschiml testimony, transcript; Millard's deposition, pp. 477-480).

821 (b) Here Eisenschiml shows, in detail and analytically, that the War Department sent troops out to patrol every road out of Washington, except the one which Booth was most likely to take, and did take. Millard takes the essence of this chapter, but not all of the details.

(38) (a) Chapter X. The Man Hunt Is On.

Chapter XI. John Fletcher Tells His Story. These two chapters belong together, as they deal with the detail of the search for Booth and his men.

(Pages 97-106, both incl. and 107-115, both incl. of Plaintiff's Exhibit 1, pages 114 of Millard's article—Plaintiff's Exhibit 3; Plaintiff's Exhibit 20, pp. 7-8; Quotes 23, 24, 25, 26 and 27, Eisenschiml's testimony, transcript; Millard's deposition, pages 65, 72, 481).

(b) These chapters tell of the adventures of a simple stableman named John Fletcher. He had let Booth's companion, Harold, have a horse and, then growing suspicious, had followed him. He arrived at the bridge and was stopped. Booth and Harold had been permitted to cross just a few minutes earlier. Eisenschiml shows, through analysis of the records and facsimiles of documents, the strange manner in which the report of Fletcher was ignored. In the same way, he shows how sound plans for the pursuit of Booth were frustrated by the War Department, and how the official transcript of Fletcher's testimony, sanctioned by the War Department, was deliberately mutilated in order to suppress the tell-tale parts of Fletcher's testimony. Eisenschiml speculates about all these strange goings-on.

(c) Millard tells the same story in the way Eisenschiml tells it, with the same suspicions, inferences and surmises.

822 (39) (a) Chapter XII. Baker Directs the Pursuit.

(Pages 116-129, both incl., of Plaintiff's Exhibit 1, pages 117, 118 of Millard's article—Plaintiff's Exhibit 3; Plaintiff's Exhibit 20, p. 8, Quotes 35, 48; Eisenschiml testimony, transcript pp. 1683-1686; Millard deposition, pp. 90, 356, 110).

(b) This chapter tells of O'Beirne's pursuit of Booth, of how he almost caught Booth, but was called back by Stanton at the critical moment. As with the other chapters, it is not simply a narrative, but is replete with surmises and analyses; and it utilizes a diary from the O'Beirne papers, which was in Eisenschiml's exclusive possession.

(c) Millard tells the same story, with the same analysis, the same inferences, and, in part, with similar language, as when he copies from the Cox diary.

(40) (a) Chapter XIV. Death Visits Garrett's Farm.

Chapter XV. The Plots Against Grant, Stanton and Johnson.

Again, two chapters are to be considered together, because in Eisenschiml's book they hang together.

(Pages 153-161, both incl., and 162-174, both incl., of Plaintiff's Exhibit 1; pages 112, 116, 118, 119 of Millard's article—Plaintiff's Exhibit 3; Plaintiff's Exhibit 20, pp. 8-9, Quote 33, Eisenschiml's testimony, transcript; Millard deposition, pp. 86, 87, 88).

(b) These chapters carry to the final cornering of Booth, and then deal with the alleged plots against other high government officials. They also show that Booth deliberately left behind clues to show where he intended to go, and Eisenschiml (a phrase paralleled by Millard in the deleted part of his manuscript) interpreted this as a game of a fox with the hounds. The chapter also shows that the alleged attempts against the other government officials, with the exception of Seward, were faked.
823 Millard follows Eisenschiml's story, conclusions and all.

(41) (a) Chapter XVI. Stanton Invents a Novel Torture.

(Pages 175-186, both incl., of Plaintiff's Exhibit 1, page 119 of Millard's article, Plaintiff's Exhibit 20, p. 9; Eisenschiml testimony, transcript, Millard deposition p. 122).

(b) The one important element of this chapter which Millard took from Eisenschiml is that a promise of clemency was held out to Mrs. Surratt, the only woman prisoner, to keep her from talking. (See also Shadow pp. 128, 130).

(42) Rest of Book. (a) For the rest, Eisenschiml develops what is already implicit in the early chapters. He analyzes the cases against Jefferson Davis, the Radicals, John Wilkes Booth, Andrew Johnson and Stanton, and deals with the military aspects of his subject (Victory Not Wanted) and much unwritten history. His method

continues to the end to be one of taking new or little known facts, fitting them into the pattern of mystery, asking questions, analyzing, making surmises, reaching conclusions.

(b) His last sentence, in harmony with the rest of the book, is: "Pending future developments, the story of Lincoln's assassination remains, in many of its phases, an unsolved mystery."

(43) What immediately follows are summaries of two portions of In the Shadow of Lincoln's Death and the general indication of the overall copying thereof by Millard.

(44) (a) Chapter II. Vox Populi.

(Pages 25-30 of Plaintiff's Exhibit 2; Pages 36, 37 of Millard article—Plaintiff's Exhibit 3; Plaintiff's Exhibit 20, p. 3, Quotes 1, 2, 3, Eisenschiml testimony, transcript; Millard's deposition).

824 (b) This chapter deals with the premature rumors of the death of Lincoln—reports in Manchester, New Hampshire, St. Joseph, Minnesota, the Middleton Whig Press, the Newburgh Journal.

(c) Millard uses the same premature and colorful rumors and reports of Lincoln's death at virtually the beginning of his article. He uses the ones digested and commented upon by Eisenschiml, and no others.

(45) (a) Chapter XIV. Problems Solved and Unsolved.

1. When Was Lincoln Shot?

(Pages 351-353 of Plaintiff's Exhibits 2, Pages of Millard article—Plaintiff's Exhibit Exhibit 3; Quote 64; Millard deposition; Eisenschiml testimony, transcript pp. Riddle testimony, transcript).

(b) Eisenschiml tells that it is known to a second when Lincoln died, and he sums up the material on this point;

then he goes on to say that no one has recorded the exact time when Lincoln was shot. He points out the disparity in the time of shooting as given in the press and by witnesses and others. Then he establishes by a process of reasoning the time as "at or close to 13 minutes past 10 p. m."

(c) The results of Eisenschiml's analysis are appropriated by Millard.

(46) The following is a synopsis, or summary, of the Millard article (with the tie-in to Eisenschiml's books indicated parenthetically):

(a) In the 87 years since Lincoln's assassination millions of words have been written about the case, but the more we know about it, the less we know about it. (Why, p. 438, last two paragraphs).

(b) Lincoln once dreamt that he saw himself dead in the White House, and the dream bothered him. (Why, p. 40, Line 6).

825 (c) While despite the dismal weather Washington was celebrating the end of the war, premature reports of Lincoln's death were circulated in St. Joseph, Minnesota, Manchester, New Hampshire, and a printed report to that effect appeared in the afternoon edition of the Middletown, New York, Whig Press. (Shadow, pp. 25, 26, 27).

(d) Lincoln and his wife, together with General and Mrs. Grant, were expected at Ford's theater that night, (Why, p. 54, first sentence) and the management of the playhouse made appropriate arrangements, among others by putting ads into the afternoon papers, in which the Grants were featured. (Why, p. 60)

(e) At 11 AM a Cabinet meeting was held, attended by Grant, Stanton arrived late, and at his entrance Lincoln froze (Why, p. 4), and as he scanned the faces around him, he saw masked hatred in some of them. Fact was that if he lived through the next four years, he would shatter their scheme of raping the conquered South. (Why, pp. 371, 419).

(f) During the meeting, Grant received a mysterious note and bluntly cancelled his engagement for the evening, greatly disturbing Lincoln. (Why, p. 61, lines 10, 16, 17). In his memoirs Grant skillfully slid over the incident and gave as his excuse his anxiety to see his children at Burlington, New Jersey. But he had not been anxious before, and the time-table showed that he would have been almost as well off, if he had gone to the theater and taken an early morning train. (Why, p. 56). Apologists blame his sensitive wife for this breach of etiquette, because she was afraid to be publicly humiliated by the jealous Mrs. Lincoln. (Why, pp. 58, 59).

826 (g) In the afternoon Lincoln took a ride with his wife alone, and on his return he talked to the guard Crook about his possible assassination. (Why, p. 44 top). He then went to the War Department and asked Stanton to loan him Major Eckert, who could break a poker over his arm. Stanton flatly refused, saying there was vitally important work to be done that night in the War Department. (Why, p. 52).

(h) In walking back to the White House, Lincoln confided to Crook that he did not want to go to the theater, but could not disappoint the people. He then bid Crook "Goodbye", instead of his usual "Good night." (Why, p. 40, line 10).

(i) Fact was that Stanton went home that evening, and so did Eckert, did not return to the War Department, (Why, pp. 37, 38), and that only three messages addressed to either of the two was recorded that night. (Why, p. 35 center).

(j) The testimony regarding the development of the assassination plot is contradictory. Booth was a spectacular, but not a very good actor, but very handsome; and very fond of liquor, for which he had an enormous capacity.

(k) Booth fancied himself a true Southerner and hated Lincoln. Originally he had attempted to kidnap the President, (Why, p. 44), which could not have been considered a crime. (Shadow, p. 17 top). For this enterprise he got as confederates Arnold, O'Laughlin, Herold, Surratt, Atzerodt and Paine, the latter to subdue the still powerful Lincoln. (Shadow, p. 9 bottom).

(l) Mrs. Surratt ran a boarding-house, (Shadow, p. 91), which Booth frequented (Shadow, p. 101). In the meantime he ran short of money, took short engagements (Why, p. 373), and plunged $6000 into the oil boom.

827 (m) Booth's kidnapping scheme was not approved by his band, and he turned to murder instead. (Why, pp. 50, 51). At 11 AM on the day of the assassination Booth heard of Lincoln's appearance. He then wrote some letters, killing time until evening.

(n) Lincoln's safety lay in the hands of John F. Parker, whose record is laid bare in detail, including the letter which Mrs. Lincoln wrote to Provost Marshal O'Beirne, and which got him the appointment. (Why, Chapter III).

(o) The number of persons in the President's box numbered five, not four as all accounts of that time claim, the fifth being Charles Forbes, Lincoln's valet (Why, p. 23, top half). During the performance S. P. Hanscom, a Washington newspaperman, entered the box and delivered to Forbes a letter for Lincoln. (Why, pp. 23 bottom, 24, 25).

(p) That letter was never found. (Why, p. 29, Lines 13, 14). Two officers, Lt. Crawford and Captain McGowan, witnessed this episode and reported it to Stanton. (Why, p. 25 top). At the Conspiracy trial McGowan was a witness, but made no mention of the letter (Why, p. 27 center).

(q) Sometime during the performance Forbes, Parker and Lincoln's coachman Burns went out together for a drink. (Why, p. 26 bottom).

(r) A few minutes after 10 PM Booth entered Ford's theatre and climbed up to the dress circle. He had previously bored a hole into the door of the Presidential box.

(s) The two guests who had taken the Grants' place, Major Rathbone and Miss Harris, later gave contradictory eye-witness testimony as to what had happened. Miss Harris originally had mentioned an intruder, whom Rathbone had interrogated, but he did not mention it, and
828 Miss Harris omitted it in her later statement (Why, pp. 25, 26).

(t) After the murder, Dr. Leale took care of the dying Lincoln, while the audience went into an uproar. Lincoln was taken across the street to the Peterson home, where Stanton temporarily visualized himself Chief Executive (Why, p. 69, line 12), and treated Mrs. Lincoln brutally (Why, p. 419 center). Lincoln died at 7:21 A.M. The time of the shot is usually accepted as 10:13 P.M. (Shadow, pp. 351, 353).

(u) In the meantime Paine had attacked Seward, leaving shambles behind him. (Why, pp. 6, 7, 170).

(v) Atzerodt's movements that day betrayed superlative stupidity. He made himself conspicuous at the hotel where Andrew Johnson lived. He then fled. (Why, pp. 167, 168).

(w) In his room the police found a heterogenous assortment of weapons and other articles. (Why, p. 168).

(x) Booth's plan was upset by a flag which Harry Ford had hung in front of Lincoln's box, and which caused Booth to fall and break a bone in his leg. Fleeing from the theatre, he was allowed by a Sergeant Cobb to cross the bridge over the Potomac, who also allowed Herold to pass. (Why, p. 107). He later was not able to identify Herold convincingly, but Herold's lawyer failed to take advantage of this opening. (Why, p. 253).

(y) A third horseman, John Fletcher, followed Booth and Herold, and was told that he could cross, but not return. Fletcher preferred not to cross. (Why, p. 107). His testimony at the trial was mutilated by the official reporter,
Benn Pitman, as shown by a comparison with the orig-
829 inal transcript. (Why, pp. 112, 113). According to the
original testimony, his statements should have been sufficient to concentrate the pursuit of the fugitives along the route reported by him, but this was not done. (Why, p. 116 top).

(z) A Captain Gleason, who knew where to find Booth, was refused the cavalry troops he requested at General Augur's headquarters (Why, p. 132 after break)

(aa) Fletcher was no mean liar himself, as shown by his contradictions in regard to time. While he testified that he had been at the bridge at 11:50 P.M., the police blotter showed that he was at the police station between 11:00 P.M. and midnight. (Why, p. 110 bottom).

(bb) In the meantime, Stanton had summoned to his headquarters his friend Justice Cartter to sift evidence and organize the chase (Why, p. 69), but, although he knew the assassin's name and had his full description, he did not even send out the news of the tragedy for almost 4 hours (Why, p. 65), and waited another hour, until the newspapers were well into their press runs, before announcing Booth's name. (Why, p. 67, second par.) The southern papers did not get the news until several days later, and it was twelve days before Macon, Georgia had the news. (Why, p. 84).

(cc) L. A. Gobright of the Associated Press sent out a quick wire that Lincoln had been shot, but followed it with a second wire to disregard the news. (Why, pp. 73, 75).

(dd) Then every commercial telegraph line out of Washington went dead for nearly two hours. This mys-

tery was never investigated, and Eckert testified later that it had not deemed sufficiently important. (Why, pp. 78, 79).

830 (ee) The first orders for the pursuit of troops went to Colonel Thompson at Darnestown, apparently on the peculiar theory that a murderer would seek refuge in enemy country. (Why, pp. 91, 133).

(ff) Booth and Herold were passing through Surrattsville, and Booth was supposed to have shouted to Lloyd, the lessee of Mrs. Surratt's farm, "I am pretty certain that we have assassinated the President and Seward." By not mentioning any other Cabinet member, he implied that no plot against any other existed. (Why, p. 171).

(gg) Booth next stopped at Dr. Mudd's house to have his leg fixed, and Herold explained to the doctor that they were riding south, but only to reach the Potomac in the hope of finding a boat headed north. (Why, p. 258).

(hh) Dr. Mudd helped Booth, and was arrested. Lafayette Baker came from New York to take charge of the pursuit. (Why, p. 118).

(ii) John Parker, the man who could have prevented the crime, had vanished after the assassination, but at 6:00 o'clock in the morning he stumbled into the police station with a prostitute he had picked up, and who was promptly discharged. (Why, p. 17 center).

(jj) Parker remained on the police force uncensored and untried, but in 1868 he was dismissed for the minor offense of having fallen asleep on his beat. He said one consolation: Secretary Stanton, too, had just been fired. (Why, p. 19).

(kk) Meanwhile Booth and Herold had reached the home of Samuel Cox, who hid them and had his brother-in-law Jones take care of them. Neither of them were 831 ever called as witnesses or punished. (Why, p. 297, 301 bottom).

(ll) Arnold and O'Laughlin had been arrested, but so swiftly that the War Department unwittingly betrayed itself. (Why, p. 49).

(mm) Major O'Beirne had picked up a false clue (Why, p. 123); but in following it, came close to capture the fugitives, as shown by an entry in his diary that Cox had been cooking provisions and carrying it to persons in the swamp. (Why, p. 120).

(nn) The next night Booth and Herold left Cox's farm and crossed into Virginia. They met 3 Confederate horsemen, who took them to Garrett's farm. (Why, p. 302, line 9). These 3 soldiers also escaped punishment, due to the War Department's "selective vengeance." (Why, p. 303, lines 4-8).

(oo) O'Beirne had again found the right trail, but his men were exhausted, and he told everything he had found out so far to Grant's chief telegrapher, who had opened a telegraph station at Port Tobacco, and gave Washington O'Beirne's information. Back came an order to O'Beirne from Stanton to remain on the Maryland side of the Potomac. (Why, pp. 122, 123).

(pp) Lafayette Baker now sent a force of 25 men, commanded by Lt. Colonel Conger and Lafayette's cousin Luther Baker, to close in on the fugitives. They cornered Booth and Herold in a barn at Garrett's farm. (Why, p. 461). Herold surrendered and Booth was shot. (Shadow, pp. 31, 33). When he was called by his name, he seemed surprised. (Shadow, p. 55, last line). Herold denied that he knew his companion. Lafayette Baker had confided to a friend that "I intended to have his body,—or a mighty good substitute for it." (Shadow, p. 73, last line). 832 The body of Booth was secretly disposed of.

(qq) Trial was prepared for eight prisoners, all chained and hooded. Only Mrs. Surratt was left un-

hooded. (Why, p. 179 center), but she was even more exquisitely tortured by having the hope of reprieve dangled before her. (Why, p. 179; Shadow pp. 128, 130).

(rr) Edward Bates and Orville Browning expressed harshly critical comments on the trial (Why, p. 230), but all prisoners were convicted. Four were hanged, the others were sent to the Dry Tortugas, where, due to a scare-telegram from Lafayette Baker, th were put into solitary confinement and not allowed to speak to anyone. (Why, p. 181).

(ss) Surratt had escaped to Europe, but was recognized time and again. (Shadow, Chapter XI). Nevertheless, the State department, after consulation with the War Department, wired to the U. S. Consul at Liverpool that no action should be taken. (Why, p. 200.) When this did not suffice, the reward for Surratt's seizure was withdrawn. (Why, p. 202).

(tt) Surratt eventually was brought back to America, (Shadow, Chapter XI) and the Government gave blunt order to "hunt up or . . . manufacture evidence" against him. (Why, p. 206).

(uu) Soon afterward Stanton was dismissed (Why, p. 431).

(vv) Mrs. Lincoln went mad, and so did Major Rathbone, who murdered his wife, the former Miss Harris. (Shadow, p. 396).

(ww) Mr. Mudd and the other surviving prisoners at Dry Tortugas were released by President Johnson. (Why, Appendix No. 12-photostat).

833 (47) Millard's article, in almost every respect, follows the outline of Eisenschiml's said two books.

(48) The characters other than Stanton have relatively minor roles in both the Millard article and the Eisenschiml book. Atzerodt does not appear in Millard's

article until page 107, where he is simply introduced in seven lines in column I, after break. He gets three more lines in column I near the bottom, a few more on page 111, column II (before and after the break) and on page 112, column I, after the break, and top of column II. His death is announced on page 120 in one line (column I, paragraph 3 after break). At no time does he play an important part. The occupants of the box, Major Rathbone and Miss Harris, get still less attention. Miss Harris is mentioned only on page 110, column I, after the break, and Major Rathbone on the same page, column I, bottom, and column II top. He is then mentioned again as bawling at the mob while he removed the bar (column II, paragraph 4 after break), and on page 120, column II, as murdering his wife, the former Miss Harris. (Column II, page 9, after break). Even Lincoln and Booth receive a much less important treatment from Millard than Stanton, and are merely sketched in as background. As to Lincoln. On page 36 of the Millard article, he tells of his dreams. On page 37 he invites Grant to the theater. On page 105 he holds a Cabinet meeting, receives Grant's refusal, and takes Mrs. Lincoln for a ride. On page 106 he tells Crook of his premonitions. After that he is not mentioned any more. As to Booth, he receives more space, but very little of what he does contributes to the mysteries of the story. On page 104, column II, last paragraph, it is told that he cut a hole in the door of the Presidential box. On page 106, column II, and page 834 107, columns I and II his background and kidnapping plot are described, and how he turned to murder. Page 108, column I contains references to his activities prior to the murder. There is nothing mysterious, colorful or exciting in all this. It is just schoolbook history. On page 109, column II, bottom and column II the deed

comes closer, and finally he consummates it. All that again is schoolbook history too. The same comment applies to page 112, column II, which describes how Booth injured his leg, and page 113, column I, alluding to the bridge episode, and page 115, column II, bottom, and page 116, Booth's flight. Minor references to the flight appear on page 117, column I, center, and column II, bottom, which is finished on page 118, top. The wind-up of the pursuit comes on page 118, and page 119.

(49) (a) Stanton overshadows by far all other people in Millard's cast, as in Eisenschiml's. Stanton's sinister part is importantly treated throughout Millard's article, and Stanton's name and the part he played are constantly kept before the reader's eyes, as in Eisenschiml's books.

(b) On page 36 appears Stanton's photo in large size. It is the only photo in the entire article. The caption underneath arouses the reader's suspicion of Stanton's complicity in Lincoln's death: "Why did he (Stanton) refuse Lincoln the guard he asked for?"

(c) On page 105, column I, after the break. Stanton is introduced to the reader as the prime suspect, but he first is shown in a bad light.

> "Only Stanton, the Secretary of War, with his curled beard that he doused with cologne . . . was missing (at the Cabinet meeting.) Stanton was late. Stanton was always late . . . he did this purposely
> 835 . . . Stanton hated Lincoln deeply and bitterly."

Having set the proper stage for his main accusation, Millard proceeds on the same page:

> " . . . And then Stanton made his delayed . . . entrance, and Lincoln seemed to freeeze . . .
> "But as Lincoln sketched his humanitarian plans, he knew full well that some of the smiling . . . faces

before him masked hatred. To radical Republicans like the weasel-souled Stanton, every breath Lincoln drew was anathema. If he lived through these four new years . . . every dream and scheme they had for raping the conquered South would be shattered."

(d) On page 106, Column I, center—Stanton's following act explains the caption under the *photo on page 36*, and again Stanton is deliberately painted in dark colors.

"Lincoln went into the War Department office where Stanton hunched over his notorious "little bells'.—the bells he had boasted could tinkle any man in the Union into prison without charge or trial." (This bell story really pertains to Seward, not to Stanton, as Millard admitted on cross-examination, but it fits well into Millard's designs.)

The story continues:

"He (Lincoln) asked for a bodyguard. 'Stanton', he said, 'did you know that Major Eckert can break a poker over his arm?"

"Stanton peeked up, startled. . . . "

"Stanton flatly refused. . . . "

836 (e) Next comes a demonstration that it was Stanton's duty to guard the President, and Millard showers Stanton with irony and a bit of ridicule. On page 106, column I, bottom—

"At the War Department, on which lay the tremendous responsibility of guarding the life and safety of the President, they labored mightily. . . .

"Or did they?"

. . .

"Secretary Stanton yawned, . . . went home to a leisurely dinner. Afterward he went over for a chat with the invalid Seward and sat around with other guests for hours. Then the sound of a band re-

minded him that a procession was going to serenade him. Stanton hurried home, made them a pretty speech and went up to bed. He was standing in his long drawers, . . . when a servant burst in with the news of Lincoln's assassination."

(f) On page 106, column II, top—suspicion against Stanton is heightened.

"And afterward Stanton swore under oath, despite the testimony of Crook and one Homer Bates of his own office, that Lincoln had not been to the War Department that day at all."

Furtlfer to show Stanton's duplicity Millard then states that:

"Only three messages were recorded that night for either Stanton or Eckert, and not a single wire went out."

(g) The next and again derogatory mention of Stanton appears on Page 111, column I, line 12—in a description of Lincoln's death scene:

837 "In rushed the Secretary of War, Edward Stanton, who visualized himself as temporarily the Chief Executive of the United States and acted accordingly. When Mrs. Lincoln, half mad with grief and shock, fainted at the sight of her dying husband, Stanton waved his arms, bawling, 'Take that woman out of here! Get her out and don't let her come back!' For a little while Stanton was a tin-plated god, with the plating wearing thin."

(h) To show that Stanton was well informed of all details of the assassination, Millard stresses the fact that two eye-witnesses advised him of what they had seen, and put it this way:—(Page 109, column I, prior to break.)

"These two, Lt. Crawford and Captain McGowan . . . rushed across . . . to report direct to Stanton . . ."

(i) To indicate that even Stanton's preliminary investigation was a star-chamber session, Millard describes it like this. (Page 114, column II, center.)

> "Meanwhile, at the Peterson home . . . Secretary of War Stanton sent for . . . his good friend . . . Justice Carter, and set up headquarters."

(j) Next Millard points out guilty knowledge on the part of Stanton prior to the tragedy: (Page 117, column I, bottom—column II, top.)

> ". . . the War Department unwittingly betrayed itself . . . Afterward Stanton tried to cover up by tracing a letter . . . but . . . only previous knowledge, concealed and denied and unused by the War Department, could have accounted for those swift arrests."

838 (k) Further suspicion is thrown on Stanton by connecting him with John F. Parker, Lincoln's delinquent bodyguard, for whose strange escape from punishment he may have been responsible, and who was not dismissed until Stanton himself lost his position.

Page 117, column I, center:

> "From an unnatural to...nce, the trial board had swung to an equally unnatural intolerance, almost as if some mysterious protection over Parker had been suddenly withdrawn. . . .
>
> Parker had one consolation . . . Secretary Stanton, too, had just been fired."

(l) Stanton's complicity is fully demonstrated on page 114 by his delay in releasing the news of the assassination and withholding the assassin's name. This is what Millard says—(Page 114, column II, line 22 from bottom):

> "The first and most important job of course, would be to identify the assassin and broadcast his identity . . . Both (Police Chief) Richard and General Augur (head of the Washington garrison) were in constant touch with Stanton."

(m) And more of the same: (page 114, column II, paragraph prior to last):

"At the moment Stanton had everything . . . the assassin's name and full description, absolute control over the telegraph lines—and all the vast machinery of the War Department at its peak of organization. 839 What use did he make of it?"

Follows the answer on page 114, column II, last paragraph:

"Stanton wasted about four hours before releasing the first notice of the assassination . . ." "He waited another hour after that—until the morning papers would be well into their press runs—before announcing the name of the suspect. . . ."

(n) Millard points out that Stanton cleverly disguised his delinquency, page 114, column II, line 25 from bottom:

". . . Stanton raged through such a massive list of less important activities that the dust he raised almost completely obscured the more important activities left undone."

(o) Next Millard goes into further detail; page 115, column I, paragraph 3,

"But not all of Stanton's errors . . . were simple errors of omissions. It is shockingly significant that, with all the evidence the government had that the escape route would naturally be Southward . . . the southern papers were the last ones to be notified."

(p) Millard indulges in some more ironic remarks about Stanton; page 114 column II, line 26 after break:

". . . we have a marvelous picture of the cool Stanton *dominating the scene. . . .*" (Italics supplied).

(q) Comes Stanton's part in the ineffectual pursuit of Booth, page 115, column II, last 3 paragraphs:

". . . The remarkable Secretary Stanton . . . was sending dispatches to commanders . . . the first orders . . . went to Colonel Thompson at Darnestown . . .

840 (Page 115, column II, last 2 paragraphs)

"on the peculiar theory that a murderer employed by the South would seek refuge in the country occupied by his enemies."

(r) In the meantime a hostler named Fletcher had made a report indicating the route Booth had taken, and Millard tells what Stanton did about it Page 114, column II, paragraph 2—:

"Now of course, there could be a swift concentration of pursuit along the road identified by Fletcher . . . But nothing at all was done about Fletcher's report!"

(s) Stanton now put the pursuit into the hands of a known rascal—Pages 117, column I, line 10 after break:

"And over them all Stanton put Lafayette Baker, whom subsequent exposures would brand as one of the greatest unhanged rascals in history."

(t) To make it clear that Stanton was protecting Booth, Millard tells how Stanton prevented Booth's capture by Major O'Beirne, page 118, column I, center:

"O'Beirne made the error of telling . . . what he had found out . . . Back came a . . . flat order from Stanton to remain on the Maryland side."

(u) Later three ex-Confederate soldiers and two other men, who had helped Booth, were gently treated by Stanton. Page 117, column I, next paragraph before break, and page 118, column I, line 15:

"Yet Cox and Jones, who willingly and knowingly kept, protected and guided the fugitives, were never called as witnesses, never brought to trial, nor punished in any way . . ."

841 "Here again we face the incomprehensible mystery of the War Department's selective vengeance. The three soldiers who openly confessed to harboring, siding and protecting the assassin were never * * * punished."

(v) To make sure that Stanton remains in the reader's mind, he and the War Department are mentioned seven times in Column II on page 119 and eight times on the last page of his article.

Page 119, column II, line 16 after break.

"Holt, Stanton's close friend", so Millard intimates, destroyed detrimental testimony.

Page 119, column II, line 23 after break.

All that the War Department retained was the blue necktie * * * the only item of clothing that could have no value in establishing identification.

Page 119, column II, line 35, after break.

Booth's body was whisked away by two detectives "toward a destination only they and Stanton knew."

Page 119, column II, line 36 after break.

The next day the Secretary of War blandly answered * * * that he had ordered Booth's body secretly buried * * *

Page 119, column II, par. 4 from bottom.

Then, in 1867, Lafayette Baker broke with Stanton * * *

Page 119, column II, par. 3 from bottom.

By order of Stanton, he, Baker, had buried the body***

Page 119, column II, last par.

The War Department had had its chase and capture. Now it must have its trial * * *

Page 120, column I, paragraph 5:

"Every move the War Department made was a bald
842 and obvious effort to rob the accused of any possible hope."

Page 120, column I, paragraph 5:

"And the War Department made it brutally clear * * * that it would not view with favor any lawyer who tried * * * to defeat the government's avowed purpose."

Page 120, column II, line 5:

"Upon a consultation with the Secretary of War • • • it is thought advisable that no action be taken in regard to • • • Surratt."

Page 120, column II, line 8:

"The War Department delayed or ignored repeated messages from men abroad • • • When the pressure grew too great, Stanton cut his Gordian Knot with one swift stroke • • •"

Page 120, column II, paragraph 5 after break:

"Stanton later found himself under hard fire • • •

Page 120, columnn II, paragraph 6 after break:

"Soon after that, Stanton was finished as a dictator • • • Stanton gave up, vacating the office he had held • • •"

Page 120, column II, paragraph 7, after break:

"Stanton's health failed rapidly. He seemed • • • like a man on the verge of madness."

843 Page 120, column II, paragraph 8, after break:

"Not long afterward, Stanton was dead. Though his family denied it, there were rumors that he had committed suicide." (Shadow, p. 228, Col. 1 after break, and p. 229, Col. II).

(50) The following comparison shows how closely Millard copied Eisenschiml's Stanton story.

MILLARD'S ARTICLE	WHY WAS LINCOLN MURDERED?
(a) Page 36, caption: Why did he (Stanton) refuse Lincoln the guard he asked for?	Page 33, title of chapter The President is refused protection.
(b) Page 105, column I, after break:	Page 4, line 12:

MILLARD'S ARTICLE	WHY WAS LINCOLN MURDERED?
. . . Stanton, the Secretary of War, with his curled beard that he doused with cologne . . .	(Stanton), with a long beard which he kept perfumed . . .
(c) Page 105, column I, par. 4 after break:	Page 4, line 3:
And then Stanton made his . . . entrance. Lincoln seemed to freeze . . . He said abruptly, "Gentlemen, let us proceed to business."	Stanton entered. The President stopped abruptly. "Gentlemen," he said, "let us proceed to business."
(d) Page 105, column I, par. 1, after break:	Page 4, line 6:
Stanton was late. Stanton was always late . . . he did this purposely to feel the power of his position.	Stanton . . . usually came late. It was his way of indicating the superiority he felt.
(e) Page 106, column I, center:	Page 32, line 6:
He (Lincoln) asked for a bodyguard. "Stanton," he said, "did you know that Major Eckert can break a poker over his arm? . . . May I take him?" . . . Stanton flatly refused . . .	The President . . . asked Stanton to let him have his chief aid, Major Eckert. "I have seen Eckert break five pokers . . . over his arm . . . May I take him?
	Page 32, paragraph 3, line 1:
	This request Stanton refused point blank.
844	
(f) Page 106, column I, bottom:	Page 31, last paragraph:
At the War Department, on which lay the tremendous responsibility of guarding	. . . the attorney general of the United States placed the responsibility

MILLARD'S ARTICLE	WHY WAS LINCOLN MURDERED?
the life and safety of the President . . .	for guarding Lincoln . . . squarely on the shoulders of Secretary of War Edwin M. Stanton.
(g) Page 106, column I, bottom:	Page 37, last paragraph:
Secretary Stanton yawned, . . . went home to a leisurely dinner. Afterward he went for a chat with . . . Seward and sat around with other guests for hours. Then the sound of a band reminded him that a procession was going to serenade him. Stanton hurried home, made them a pretty speech, and went up to bed.	Stanton went home and dined as usual. He then went to see Secretary of State Seward . . . There he found six or eight people and stayed chatting with them till he heard the music of a procession which had notified him that it would call on him. Thereupon he went home, made the serenaders a little speech . . . and went to his bedroom.
(h) Page 1106, column II, top:	Page 34, line 3:
And afterward Stanton swore under oath . . . that Lincoln had not been to the War Department that day at all.	What can it mean that Stanton during a congressional investigation, testified under oath that Lincoln did not visit the War Department at all after April 13?
(i) Page 106, column II, before break:	Page 35, paragraph 2:
Only three messages were recorded that night for either Stanton or Eckert, . . .	Only three telegrams addressed to either Lincoln or Stanton are officially on record as having arrived at the War Department during the evening . . .

MILLARD'S ARTICLE	WHY WAS LINCOLN MURDERED?
(j) Page 111, column I, line 14:	Page 419, paragraph 3:
When Mrs. Lincoln, half mad with grief and shock, fainted at the sight of her husband, Stanton waved his arms, bawling. "Take that woman out of here! Get her out and don't let her come back!"	Mrs. Lincoln, frightened and distracted, had fallen to the floor in a faint. A sudden rage possessed Stanton. Brutally he gave orders to take "that woman" out of the room and not to let her come back.
(k) Page 114, column II, center:	Page 69, par. 2, line 4:
Meanwhile, in the Peterson home . . . Secretary of War Stanton sent for . . . his good friend . . . Justice Cartter, and set up headquarters.	In the back room of the Peterson house he (Stanton) and the Justice Cartter . . . (a close friend of Stanton's) had established a preliminary court of inquiry.
845	
(l) Page 117, column 1, bottom:	Page 49, paragraphs 2 and 3:
Arnold and O'Laughlin had been arrested so swiftly that the War Department unwittingly betrayed itself . . . only prior knowledge, concealed and denied and unused by the War Department, could have accounted for those swift arrests. . . .	On what information could O'Laughlin and Arnold possibly have been suspected . . . ? In arresting these two men, the War Department erred . . .
(m) Page 117, column I, center:	Page 19, center paragraph:
From an unnatural tolerance, the trial board had	Parkers last offense was perhaps the least impor-

MILLARD'S ARTICLE	WHY WAS LINCOLN MURDERED?
swung to an equally unnatural intolerance, almost as if some mysterious protection had been suddenly withdrawn . . . . Parker had one consolation . . . Secretary Stanton, too, had just been fired.	tant one . . . Yet the official axe fell promptly and relentlessly, . . . A few weeks prior to Parker's dismissal, Secretary of War Stanton had finally been ousted from his position . . .
(n) Page 114, column II, line 22 FROM BOTTOM:	Page 67, paragraph 3:
The first and most important job of course, would be to identify the assassin and broadcast his identity . . .	If Stanton wanted Booth caught, it was important to broadcast his name.
(o) Page 114, column II, bottom:	Page 68, line 3:
Both (Police Chief) Richards and General Augur were in constant touch with Stanton.	Richards immediately got in touch with General . . . Augur . . . Augur, in turn, was in and out of the Peterson house . . . (where Stanton was) all night long . . .
(p) Page 114, column II, paragraph before last:	Page 69, paragraph 2:
Stanton had . . . the assassin's name and full description . . .	Stanton had full knowledge of the assassin's identity . . .
(q) Page 114, column II, last par.:	Page 65, line 7:
Stanton waited about four hours before releasing the first notice of the assassination.	—the first dispatch of the Secretary of War was not written out until more than three hours after Booth's deed.

MILLARD'S ARTICLE	WHY WAS LINCOLN MURDERED?
(r) Page 115, Column I, 1st Par.:	Page 67, paragraph 2:
He (Stanton) waited another hour after that . . . before announcing the name of the suspect.	Not until 3 o'clock in the morning did Stanton finally disclose the name of the assassin.
846	
(s) Page 115, column II, last 3 par.:	Page 91, line 7:
" . . . the remarkable Secretary Stanton . . . was sending dispatches to commanders . . . the first orders . . . went to Colonel Thompson at Darnestown . . . "	. . . Military dispatches left the War Department . . . Colonel Thompson, commanding at Darnestown, was probably the first to be instructed . . .
(t) Page 114, column II, par. 2:	Page 116, top:
Now, of course there would be a swift concentration of pursuit along the road identified by Fletcher . . . But nothing at all was done about Fletcher's report.	The story . . . Fletcher told should have caused all pursuit to converge on the roads through the Maryland peninsula, but this was not the immediate result.
(u) Page 117, column I, line 10 AFTER break:	Page 121, top:
And over them all Stanton put Lafayette Baker . . .	Colonel Baker had been summoned by a direct telegraphic appeal from Stanton.
(v) Page 118, column I, center:	Page 123, line 13:
O'Beirne made the error of telling . . . what he had found out. Back came a . . .	(O'Beirne) gave to the War Department the gist of the information . . . orders came

MILLARD'S ARTICLE	WHY WAS LINCOLN MURDERED?
flat order from Stanton to remain on the Maryland side.	over the wire from Washing to . . . remain on the Maryland side . . .
(w) Page 117, column I, paragraph before break:	Page 301, line 5 from bottom:
Yet Cox and Jones, who willingly and knowingly kept, protected and guided the fugitives, were never . . . brought to trial . . .	Yet, in the face of all this evidence, no indictment was brought against either Cox or Jones . . .
(x Page 118, column I, line 15:	Page 136, line 5:
Here again we face the incomprehensible mystery of the War Department's selective vengeance.	Another bizarre feature . . . is the failure of the War Department to prosecute some people . . .
(y) Millard, p. 120, Col. II, par. 8, after break:	Shadow, p. 228, line 1 after break, and p. 229, line 11:
Not long afterward, Stanton was dead. Though his family denied it, there were rumors he had committed suicide.	That Stanton did not die a natural death but committed suicide has been asserted . . . Against these Stanton's family . . . maintained an attitude of . . . silence.

(51) Following the publication of the said book-length article in defendant's magazine True in February 1953, a number of persons, including students of Abraham Lincoln, the Civil War and American history, called Eisenschiml's attention to the said publication, remarking upon the close similarities between it and Eisenschiml's said two books, and asking him if the said publication was written by him under a pseudonym. (Par. 22 of Plaintiff's Exhibit 7).

847 (52) At that time Eisenschiml was seeking to find a publisher for a new edition of Why Was Lincoln Murdered? and was assured by his agent, prior to said infringing publication, that it was likely that such publisher would be found. Thereafter he was advised by the agent that the said infringing publication made it unlikely that such publisher would be found and that if found the sale of copies would be impaired. (Par. 23 of Plaintiff's Exhibit 7).

(53) One Charles E. Mason, a former State's Attorney of Lake County, Illinois, a lawyer, and a student of history, wrote to defendant without plaintiff's knowledge, under date of February 19, 1953, calling his attention to what appeared to him to be infringements of the copyrights of the plaintiff on the said two books. Under date of February 27, 1953, the defendant replied to the said Charles E. Mason as follows:

(Text of letter part of par. 24 of Plaintiff's Exhibit 7—Appendix pp. 28-9)

(Admitted by defendant—Plaintiff's Exhibit A, of Deposition of Ralph Daigh—Plaintiff's Exhibit 13—pp. 18 and 19 thereof).

(54) The February 1953 issue of the defendant's publication True, containing the infringing book or book-length article, was sold to the public at 25¢ per copy. 1,898,285 copies of the said February 1953 issue were sold, bringing in a total of $474,571.00 from sales, and that in addition there was an advertising revenue for the said issue of $193,772, making a total income of $668,343.00. (Admitted).

(55) The infringing book or book-length article took up about 25% of the contents of the February 1953 issue of True and was the main feature of the said issue. (By computation and examination of issue).

(56) Except for the material and language taken from Eisenschiml's said two books, the said infringing book or book-length article published by defendant could not have been written. The said copied or pirated material and language are the heart and gist of the said book or book-length article. (See findings 25 ff. hereinabove and Plaintiff's Exhibit 20).

(57) In addition to the thirteen identical passages picked out by Dr. Riddle, outstanding examples of Millard's copying of language found by him are in the following Quotes:

849

MILLARD:	EISENSCHIML:
Quote 4	
In his memoirs, Grant skillfully slid over the incident with the excuse of much work to be done and an overwhelming anxiety to see his children.	In his memoirs, Grant passed over this episode skillfully . . . if able to finish his work his intention was to join his children.
Quote 11	
How about the busy Major Eckert? He . . . did not return to his office that night. There is no record . . . of how he spent the evening. . . .	Now as to Eckert . . . was he at his post during the hours . . .? He was not. We have no record of his doings that night. . . .
the news of the assassination reached him at his home, where he stood . . . shaving.	he was found at home shaving, when one of the telegraphers came . . . to advise him of the catastrophe.
Quote 14	
. . . We find Parker on trial again, this time charged with being drunk . . . in a home of ill fame operated	Parker again found himself before the Police Board. . . . This time he was accused of having visited a house of

MILLARD:	EISENSCHIML:
by one Annie Wilson . . .	prostitution kept by a Miss Annie Wilson . . .
In his defense Parker paraded . . . witnesses. They all testified warmly to the good character of John Parker, one girl going so far as to cry . . . that John had been staying at the boarding house for five weeks, and had never been seen drunk.	The witnesses . . . proved staunch champions for the defendant, one of them going so far as to declare that he had never in his life seen Parker drunk, "and he had been in that house for five weeks."
Quote 18	
. . . there is no record of any dispatch at all, and none was ever found. Forbes made no public mention of it at all.	If a document was found on Lincoln's body, the story has never been told. If Forbes failed to deliver it, he never disclosed the fact.
Quote 20	
At the trial McGowan's testimony made no mention of	The witness McGowan made no mention . . . of
Quote 28	
The Richmond Whig got no notice at all, . . . It was twelve days before Macon, Georgia, heard the news.	The Richmond Whig did not print the news until Monday morning. . . . The Macon Daily News . . . did not receive Stanton's dispatches until April 26.
850	
Quote 29	
One L. A. Gobright of the Associated Press was just closing his Washington office when the terrible news came.	L. A. Gobright, agent of the Associated Press at the Capital . . . was about to close his office . . . when he was informed of the tragedy.

MILLARD:	EISENSCHIML:
Rushing out, he quickly wired his paper . . .	Rushing to the telegraph he sent a short special . . .
From there Gobright hurried to Ford's theatre for more details . . . found the derringer on the floor.	. . . he tore over to Ford's theatre . . . and was fortunate . . . to find Booth's derringer on the floor . . .
Quote 32	
The first order . . . went to Colonel Thompson at Darnestown.	Colonel Thompson, Commander at Darnestown, was probably the first to be instructed . . .
Quote 34	
John Parker had vanished after the assassination . . . what he did . . . nobody knows.	What Parker did . . . after the assassination has not been . . . ascertained.
But at 6 o'clock . . . he stumbled into Police Headquarters towing . . . a prostitute named Lizzie Williams . . . Lizzie was promptly discharged.	The police blotter . . . shows that at 6 AM . . . Parker brought to headquarters a woman by the name of Lizzie Williams . . . who . . . was promptly discharged.
Quote 35	
O'Beirne was writing in his journal "Samuel Cox. His mill servant states to another colored man that Cox had been cooking provisions lately, and carrying it to persons down in the swamps" . . . That close O'Beirne came to making the capture. . . .	In a diary (O'Beirne wrote). "Samuel Cox his mill servant states to another colored man that Cox had been cooking provisions lately, and carrying it to persons down in the swamps. . . ." That close O'Beirne came to getting his man.
Quote 40	
The . . . tavern . . . was . . . a ramshackle farm tavern with a peach orchard . . . and	(It) was a solitary farm tavern at a crossroad, a few sheds and barns . . . and a

MILLARD:	EISENSCHIML:
a few sheds and barns lying across the road. . . . His mother had leased the place . . . for $600.00 a year.	peach orchard. . . . The farm was . . . let . . . for $600.00 a year.
Quote 42	
(Paine had) the strength to subdue the . . . still-muscular Lincoln.	Paine with his . . . strength was to have subdued the powerful Lincoln.
851	
Quote 49	
The three soldiers, who openly confessed to . . . aiding . . . the assassins were never tried . . . Jett was even used as a government witness.	Jett, Bainbridge and Ruggles never denied their . . . parts, but none of them were ever prosecuted, and Jett even appeared as a witness for the government.
Quote 52	
Would a dying man be surprised at hearing his own name spoken?	What can be the meaning . . . a dying man hears his name mentioned . . . and acts surprised.
Quote 56	
The American Vice Consul at Liverpool . . . got a shocking lesson . . .	The vice consul at Liverpool probably got the shock of his life . . .
Quote 62	
Announcements played up the presence of General Grant in bold headlines and mentioned the Lincoln as a small-type after-thought.	The advertisements centered around . . . Grant, barely mentioning the President.
Quote 65	
A good . . . lawyer could have pounced on this . . . but Frederick Stone, his counselor, said nothing at all about this.	A clever lawyer might have made something out of this . . . But Frederick Stone, who conducted the defense, did little . . .

(58) Thomas J. Naughton was associate editor of True at the time that Millard's earlier article, "The Devil's Errand Boy" was accepted for publication. Naughton edited it for publication. It made so great an impression on him that as a result he later suggested to Millard the writing of a book-length feature on the mysteries and peculiarities of the assassination of Lincoln. (Naughton testimony, transcript p. 178). Millard thereupon submitted such article to Naughton and, after Naughton, Ken Purdy and Ralph Daigh had read and approved it, it was accepted for publication. Again Naughton edited the article for publication. Because it was much too long, it was cut drastically. Naughton made all of the cuts, with the general approval of Millard, who was not told which
852 particular passages were to be deleted. Among the passages cut from the article was the only reference to Eisenschiml, the passage in question reading as follows:

> "Otto Eisenschiml, probably the world's leading authority on the mysteries of Lincoln's assassination, has in one curt sentence treated Stanton's diatribe to the respect which it deserves . . ." (Millard deposition p. 263).

Asked if he had read any books about the Lincoln assassination, Naughton replied: "No, sir. I don't need to. I read Millard's story." (Naughton testimony, p. 200). Later he said he had been joking when he said this. (p. 203).

(59) The defendant has a research department but the Millard article was never submitted to it for check-up before publication. No effort of any kind was made prior to publication to check for possible copyright infringements in the article. The defendant relied upon its editor and Millard's previous good reputation. The article was never submitted to any historical scholar or Lincoln authority despite the recommendation of one of the editorial readers

of the article. No one checked on the sources and credits. (Naughton testimony, transcript pp. 202-204).

(60) The plaintiff called Dr. Donald W. Riddle as an expert witness in his behalf. The direct testimony of this witness required 103 pages (Transcript pages 89 to 170, both incl., and 219 to 241, both incl.) and would have been considerably shorter except for the insistence by defendant's attorneys that all of the parallels and derivations found by Dr. Riddle be read verbatim into the record (despite their being set forth in Plaintiff's Exhibits 15 and 16.) The cross-examination of Dr. Riddle was by far the most protracted of the case, consuming 772 pages (Transcript, pages 242 to 284, both incl., 361 to 1091, both incl.) Plaintiff objected to the length and nature of this cross-examination (Transcript pages 1057, 1058). It is, therefore, important to give the qualifications of Dr. Riddle and the essentials of his testimony. 853

(61) Dr. Riddle received his education at Northwestern University, Garrett Biblical Institute, the University of Chicago, Heidelberg University and Harvard University. (Transcript 219). He has received the degrees of Bachelor of Philosophy, Bachelor of Divinity, Master of Arts, and Doctor of Philosophy. He has taught Biblical literature and languages at Kimball College (1922, 1922, 1925), New Testament history and literature at University of Chicago (1923, 1926 to 1942) and American history at the University of Illinois (1946 to date). From 1942 to 1946 he was in the Army. (Transcript page 220). He has published a number of books and other writings on Biblical language and literature, and another book, on the Lincoln theme, Lincoln Runs for Congress. He has another book, Abraham Lincoln Congressman, almost ready for publication. He belongs to learned societies like the American Historical Association, the Mississippi Valley His-

torical Association, the Illinois State Historical Society and (until it went out of existence) The Abraham Lincoln Association (Transcript page 221). He has also belonged to various learned societies in the field of Biblical literature. He has read all of the principal literature on Lincoln biography and has exhaustingly worked the sources in his specialized field, Lincoln's Congressional career. (Transcript, p. 222).

(62) Dr. Riddle is head of the Division of Social Sciences at the University of Illinois, Chicago Undergraduate Division. His primary field in teaching is American history. He has been a teacher for 32 years. (Transcript 89).

He has taught American history for the past eight 854 years. Prior to that he taught in the field of New Testament history and literature. His studies in that field included the comparison of tex r language. (Transcript 90). In attempting to work out the problems of literary relationship in that field the Greek texts are printed in parallel columns so that at a glance one can see the identity or similarity or difference between the various Gospels. The same methods, he testified, are used for comparison of other documents, sources or books. (Transcript, page 91).

(63) He read the two books by plaintiff (Plaintiff's Exhibits 1 and 2) that are in issue herein and the Millard article (Plaintiff's Exhibit 3) (Transcript pages 93-94). With the plaintiff's said two books and the Millard article before him, he made a comparison of the language in the article with the language in plaintiff's two books. He found passages in the article identical with passages in plaintiff's two said books. (Transcript, page 95). He marked on the margin of the article the points at which he observed similarity. He proceeded to underline instances of close similarity. (Transcript, page 96). On the basis of that study he found 85 instances of parallelism between the Millard article and the Eisenschiml books, and of those 85

(Plaintiff's Exhibit 5) he found 13 in which there was identity of language of from 13 to 33 words. (Plaintiff's Exhibit 16 for identification). These he underlined in his copy of the Millard article (Plaintiff's Exhibit 15) (Transcript page 97). The thirteen said instances of identical language are set forth on pages 99 to 105, both inclusive, of the Transcript. The said 85 parallelisms, including again the 13 instances of identical language, are set forth on pages 111 to 169, both inclusive, of the Transcript.
855 These are largely the same as plaintiff's 66 quotes, with additions.

(64) Dr. Riddle is receiving no compensation for testifying or for other services in connection with the case. He is not related to Eisenschiml or counsel. (Transcript 219, 252).

(65) He is familiar with the reputation of Eisenschiml among Lincoln experts and American historians (Transcript pages 222, 223). He knows the reputation among Lincoln experts and American historians of plaintiff's two said books, and particularly as to originality. (Transcript, pages 223, 224). The reputation is that Eisenschiml is a scholar who has produced the two books on the basis of original research in original sources with the result that new and important findings are contained in the books as published. (Transcript, p. 224). In Riddle's own opinion the two books are highly original. (Transcript, pages 226, 230). He testified to the novelty and originality of Eisenschiml with respect to the various items set forth in paragraphs 19 and 20 of the plaintiff's affidavit for summary judgment. (Transcript, pages 232 to 238, both inclusive).

(66) Dr. Riddle did not assist in the preparation of the parallel columns as they appear in Plaintiff's Exhibit 7, and did not receive a copy of them until after he had done his own comparing of texts. His undertaking was entirely

independent; he worked on his own. (Transcript, page 243). The plaintiff's attorney, Elmer Gertz, asked him to appear as an expert witness and gave him the two Eisenschiml books and the Millard article, but no guidance or direction. He did the work of comparison on his own. (Transcript, page 251). Gertz did not give him the idea of parallel columns; it was his own idea. Gertz made no reference to anything he (Gertz) had done. (Transcript, page 252) and no suggestions (Transcript, page 254).

856 (67) Dr. Riddle did not go beyond the four corners of the conflicting works (Transcript, page 255). His general conclusion is that "the substance of the Millard article is derived from (the Eisenschiml books)" Transcript, page 1089).

(68) Joseph Millard, the author of the article in issue, testified to his general attitude, his state of mind, on the use of sources. He was asked, ". . . did you in many instances attempt to examine original sources?" To this he replied: "In all instances I attempted to. In many instances I was unable to without taking a lot of expensive trips to the places where that source material was." (Millard deposition, p. 533). He was asked with respect to matters that he thought were Eisenschiml's discoveries, if Eisenschiml was the first scholar to call them to his attention, and he replied: "That is a fact." Then he was asked as to such matters: "And then . . . you either verified it or took his (Eisenschiml's) word for it?" To this he answered: "Yes." (Millard deposition, p. 492). He was asked: "Did you understand at the time you wrote your article that you had the right to use any factual material found in copyrighted books without looking at original sources?" He answered: "I thought I had the right to." (Millard deposition, p. 520). He thought, also, that he had the right to use any surmises or inferences. (Millard depo-

sition, pp. 534-535). He said: "I believe I could say without error that the only statements I did accept without being able to at least prove the existence of primary sources were a couple which I took from Dr. Eisenschiml because I simply wouldn't think of questioning his veracity on any of this matter. But in every other case I am positive that I determined that sources existed even though they might
857 not have been available to me at the moment." (Millard deposition, p. 452). Thus he knew that the police records existed at one time; but he made no effort to check the original records, but relied upon Eisenschiml. (Millard deposition, pp. 452-453). As to the O'Beirne papers which, admittedly, were in the exclusive possession of Eisenschiml and never had been seen or consulted by Millard, Millard testified: "As a matter of fact, and I don't know how come, but I seemed to have missed the footnote mentioning the O'Beirne papers. Most of the statements which turn out to have been a part of the O'Beirne papers I had placed in my mind as being also available through other sources." (Millard deposition, p.).

(69) Millard admitted, in varying manner and degree, that various portions of his article were derived from Eisenschiml's said two books. At page 63 of the Millard deposition, defendant's counsel read Quote 22, and then asked: "Did you steal or pirate that from Dr. Eisenschiml?" To this, Millard replied: "I am rather afraid I did. I have sources for his later statements, but as I remember I had no source other than Dr. Eisenschiml for the original statement." (Millard deposition, p. 63). At p. 51, he said that it was from Eisenschiml that he "supplied the missing words of Mrs. Lincoln's letter about Parker." (Quote 15). At p. 52, he said as to Quote 16 that he did not have the Forbes statement at the time he wrote his article. At pp. 56 and 57 when asked twice,

with respect to Quote 18, when he read The National Republican, he failed to answer. At p. 65, when asked about Quote 23, he said that he got Fletcher's statement from Eisenschiml, and not from the archives. At p. 68, said with respect to Quote 24 that he took from Eisenschiml the research about Fletcher's being at the police station — "and that I had no other source for" it save Eisenschiml. At p. 72, he said, as to Quote 27, that he took the number of persons on the police blotter from Eisenschiml. At page 86, as to Quote 33, he said that
858 the "inference" on Lloyd's statement was "encouraged by Dr. Eisenschiml's interest in it, I am afraid." Then on p. 87, he continued with respect to the same Quote 33, "It is probably reasonable to suppose that that inference was stimulated or stirred by some of your findings, Doctor (Eisenschiml)." And on p. 88 he repeated the credit to Eisenschiml as to the same inference. At p. 89, as to Quotes 34 and 34A, he said the "inference" as to dismissals of Parker and Stanton were "drawn" from Eisenschiml. At p. 90, as to Quote 35, he said: "My sources for the quotation itself within the quotes is Dr. Eisenschiml." At p. 235, he said: "I would guess that in the case of Quotes 13, 14 and 15, regarding the life of Parker, the details on Parker, that probably comes under Dr. Eisenschiml's credits. . . ." And at p. 238, he said: "I am referring to Quotes 34 and 34A, which are in reference to Parker, and I imagine they fall under the Eisenschiml credit." This he reaffirmed on p. 239. At p. 238, he was unsure about Quote 21, and on p. 239 he was unsure about Quote 42. At p. 321 he said, with respect to Quote 28, that he never saw the Macon Daily News of April 26, 1865, and that his sole knowledge of its contents is from Eisenschiml's books. At p. 324, he said that Eisenschiml stimulated his curiosity as to premature

Lincoln death announcements (Quotes 1, 2 and 3). At p. 325, he said that he had never looked at The Newburgh Journal (Quote 3). At pp. 326 and 327 he said that he was not sure that he had seen the New York Sun of Feb. 11, 1917, the source for Quote 50. At p. 327, he said, as to Quote 50, that it is "possible" that his source was Eisenschiml's book. At pp. 333-339 he said that he had never seen the police blotters. At p. 335 he said as to the Forbes statement that he had never seen (it) anywhere except in Eisenschiml," confirming his previous statement. (Quote 16).

859 At pp. 333-339 he was not sure as to whether he had read Gleason's Magazine of History article (source of Quote 26). At p. 355-356 he said that he could not recall reading the Boston Sun Post of April 11, 1915 (source of Quote 11). At pp. 372, he was asked: "Is it possible that in your absorbing of material you tended to forget that you got some of it from the Eisenschiml books?" To this he replied: "Oh, I got some of it from the Eisenschiml books." He was asked further: "But is it possible that you got some that you now are not aware of that you got from the Eisenschiml books?" And he replied: "Yes, that's possible." At pp. 382 and again at p. 467 ff. he said that he got from Eisenschiml that material enumerated in Paragraphs 19g, h, i, n, t, u, v, gg, hh and ii of Plaintiff's Affidavit for Summary Judgment. (Plaintiff's Exhibit 7). At p. 393, he admitted, as to Quote 35, that his language and Eisenschiml's were similar. At pp. 410-411, he said that only he and Eisenschiml made the observation contained in Quote 65. At p. 436-437, he said as to the discrepancy between Grant's Memoirs and his actual doings (Quotes 4, 5, 6): "That, I believe, was queued to me by Dr. Eisenschiml's book." At p. 439, when asked what made him examine the false statements of Harris and Rathbone (Quote 22), he replied:

"That was directly Dr. Eisenschiml, as I believe I said before."

(70) Millard admitted that various portions of the cut-out, or deleted, part of his manuscript were derived from Eisenschiml. At p. 217 of his deposition, when asked if he got a certain portion of the deleted section from Eisenschiml, he replied: "Not consciously, but we have—identically the same sentence here." At pages 223-224 of his deposition, when asked the same question about
860 another portion of the deleted section, he replied: "It is a possibility. . ." At p. 249, he said as to another portion: "I have a sneaking hunch probably that is Dr. Eisenschiml's inspiration . . . It could be, it could very well be. . ." At p. 252, he was less definite, but added: "This is not a denial. . ." At pages 256-7, he said "the thought was undoubtedly inspired by Dr. Eisenschiml." Asked then, "It is not only the idea, but the language?", he replied: "That's right." At pages 267, 276, 294, he similarly credited Eisenschiml. At p. 295, he admitted "there is a similarity" to p. 264 of Eisenschiml's Why Was Lincoln Murdered? At pages 297, 301, 305, 306, 308, 310, of his deposition he said he got the material from Eisenschiml. At p. 305, he was asked, "Do you recognize that there is a similarity?" and he replied. . . "There is a similarity and a rather shocking one to me."

71 (a) Millard admitted that the matters set forth in sub-paragraphs g, l, i, j, of paragraph 20 of plaintiff's affidavit for summary judgment (Plaintiff's Exhibit 7) were among "the sensational discoveries" made by Eisenschiml. (Millard deposition, p. 378).

71 (b) During his testimony Millard read from about 66 cards, which allegedly contained his historical sources. On none of them appeared a reference to Eisenschiml's books, although he admitted on direct and cross-examination that they were in several cases the only available

source. (For example: Quotes 7, 15, 22, 24 partly, 28 partly, 34, 35, 62.)

(72) Neither Millard nor the defendant ever asked or received permission to use any material from Eisenschiml's two said books.

(73) Certain Quotes (Nos. 13, 14, 15, 21, 34, 34A) pertain to John Parker, the Presidential guard whose negligence was a contributing factor to the assassination of Lincoln. Eisenschiml was the first one to publish the full story of Parker. He dug some of Parker's record from O'Beirne's private papers, which were in his exclusive possession. This included Mrs. Lincoln's letter to O'Beirne. Millard had no access to this letter nor to the other O'Beirne papers at any time. They had never before been published, and their very existence was
861 unknown to historians. The bulk of the Parker record was obtained from the files of the Metropolitan Police Department of Washington, D.C., under great difficulties, as they were buried under an accumulation of files and records dating from 1861 to 1933. Parker's record was spread over several files, and written in the form of statistical information, without connecting narrative. Eisenschiml collected all the pertinent information and put it into a connected narrative. (Eisenschiml testimony, Transcript .....). Millard never examined any of the material at the Metropolitan Police Department of Washington.

(74) At various points during his deposition Millard displayed ignorance of well-known historical facts with respect to The Civil War.

(a) At p. 166, he said that McClellan was associated with "the radical element," whereas McClellan was the target of the hatred of the Radicals.

(b) At p. 178, he said, "I never could remember who was in that (Lincoln's) cabinet."

(c) He referred (p. 189) to the Southern viewpoint as being expressed by Charles Francis Adams; and when asked if Adams was the Northern minister to England during the Civil War, he replied: "I don't know."

(d) Millard states (page 110 of his exhibit, column 1, paragraph 3), that "we don't know where he (Booth) got the wood," meaning the wood with which the door to the Presidential box was braced. Booth took it from a music stand in the orchestra.

862 (e) Millard tries to make a mystery of Sergeant Dye's testimony, (pages 109, column II, and page 110). This so-called mystery was completely cleared up in the Surratt trial, with which he evidently is not well acquainted. (See Shadow, page 286, top).

(f) On page 110, column II Millard says, "for everyone who identified Booth, there was another equally positive that it could not possibly have been Booth." No one ever denied that it was Booth. Some were very certain that it had been Booth, some were uncertain. No one said it could not possibly have been he.

(g) On page 113, column I, paragraph 5, Millard wonders why Paine needed a guide, since he knew the way to Seward's house. Millard overlooks that Paine did not know the way to Surrattsville (where he was supposed to meet Booth), especially at night. Herold did, hence he was to act as guide.

(h) On the same page paragraph 8, Millard manufactures a new mystery for the reader. "A second rider," he says, "supposed to have been Herold. . ." He repeats it, column II, paragraph 2, by stating "if it was Herold." Of course it was Herold, as appeared from the sequence of events. There was no mystery about it at all.

(i) On page 106, column I, paragraph 6, Millard mentions Stanton's "little bells". These bells were Seward's boast, not Stanton's.

(j) The "gin-soaked prostitute" (page 34, last line) was, of course, never under suspicion in connection with the plot, as Millard indicates.

(75) The defendant took the deposition of Mrs. Joseph J. Millard (the wife of the author of the True article in issue herein) by written interrogatories, and, although objecting to some of the defendant's interrogatories, 863 the plaintiff sought at the same time answers to cross-interrogatories. When the said deponent answered the interrogatories and cross-interrogatories, the defendant refused to introduce the deposition. Therefore, the plaintiff introduced the deposition as the testimony of an adverse witness. Mrs. Millard either failed to support or contradicted the testimony of her husband on several points, namely:

(a) The Millards stored some of the personal property, furniture and other miscellaneous property that they removed from their house when it was sold. She does not personally recall that they destroyed anything when they moved. She "presumes" that she discussed with her husband putting things in storage and leaving behind anything they did not want, but she does not "actually recall any conversation on that line." She could not give the place or time of any such conversation.

(b) She does not recall saying to her husband that she was glad to see him give up writing historical pieces.

(c) She does not know that her husband destroyed any material; although she "presumes" that he did. She deposed, in answer to cross-interrogatory 13 on that subject: "As I recall we did not destroy them.

At least I didn't." There were warehouses in the community "but as I say, I don't recall destroying" anything.

(76) In the Foreword to Volume One of Abraham Lincoln, The War Years, by Carl Sandburg, at page XVII, under the heading, Sources and Acknowledgments, appeared these words:

"The elaborate researches of Otto Eisenschiml on the closing scenes of Lincoln's life are a distinct contribution; his failure to prove the main implied thesis of his book, Why Was Lincoln Murdered? (Little, Brown, 1937) does not invalidate his other work in revealing the melancholy role of the muddled John F. Parker and of other figures in drab."

(77) At page 745 of the One Volume Edition of Abraham Lincoln, The Prairie Years and The War Years, by Carl Sandburg, under the heading, Sources and Acknowledgments, appear these words:

"In the American Iliad, Otto Eisenschiml and Ralph Newman give a narrative of the Civil War by selected eyewitnesses and contemporaries. Eisenschiml's In the Shadow of Lincoln's Death (1940) relentlessly asks grim unanswerable questions."

(78) In the Millard article credit is given to Carl Sandburg at two places (p. 115, Col. II, after break; p. 111, Col. II, prior to break) and to DeWitt in one place (page 111, Col. II, prior to break). In addition, Millard frequently mentions a number of the characters who wrote books and articles, such as Crook, Baker, Ferguson, Gleason, Pitman and others.

(79) Dr. Ernest Samuels, professor of English at Northwestern University, testified in behalf of the defendant. He had taught from 1931-39 at the State College of Washington, was visiting associate professor at the University of Chicago in 1950, and the rest of the time

he has taught at Northwestern; recently becoming a full professor there (Testimony of Samuels, Transcript p. 1877). He received his Ph. B. in 1923, his J.D. in 1926, M.A. in 1931 and Ph. D. in 1942. He has written two 865 English text-books and a biography of the Young Henry Adams. (Transcript p. 1878). He is a corresponding member of the Massachusetts Historical Society. (Transcript p. 1879). At Northwestern he supervises the work of about 1200 students and 32 instructors. He handles the problems of cheating by students. (Transcript 1882). He is not an expert on the Civil War or Lincoln, (Transcript p. 2140) except as they pertain to the Adams family and is not familiar with the literature of the assassination. After he had read Why Was Lincoln Murdered? and the Millard article, but not In the Shadow of Lincoln's Death, he was asked, and paid for, his opinion of the originality of the Millard article. (Transcript p. 2069) After he had given his opinion that the Millard article is an independent work, and had been paid therefor, he agreed to testify as an expert witness herein, for which he is also to be paid. "I am no volunteer witness", he said. (Transcript p. 2064, 2065).

(80) Subject to the plaintiff's objection, Defendant's Exhibit 4 of May 16, 1955, was received in evidence. In the form it was originally received in evidence, the document consisted of approximately 100 typed pages in alphabetical order according to authors. It was later augmented by a number of pages. The document purports to give excerpts from various books, allegedly containing source material for the Millard article. In its original form, each excerpt listed the name of the author and book, the edition by year, the pages excerpted, the library in Chicago where the book was found, the quotes and affidavit paragraphs to which the excerpt allegedly pertained, whether consulted by Eisenschiml or Millard or both of

them, and other similar allegations. The one who prepared the document was not called as a witness. The only witness who testified with respect to the document was Dr. Ernest Samuels, called by the defendant as an 866 expert. He testified that when he first saw the 66 quotes, he was amazed by the close parallels that he found (Transcript p. 1907, 1995-6). But when he studied the Millard article further and sampled the material in Defendant's Exhibit 4 of May 16, 1955, he changed his mind about the closeness of the parallels and decided that there was no over-all plagiarism and that Millard had done an independent job of research.

(81) On cross-examination, he admitted that he had not read the exhibit through and that he had no knowledge as to its accuracy in any respect, and particularly as to whether Millard had consulted any of the alleged sources, or where, or when, or whether the excerpts were accurately set forth, or whether they pertained to any of the quotes or affidavit paragraphs. (Transcript pages 1987-8, 2071-2081). It was agreed, subject to verification, that none of the excerpts in Defendant's Exhibit 4 of May 16, 1955, referred to quotes 2, 3, 10, 12, 17, 21, 22, 23, 30, 32, 34, 40, 43, 44, 47, 48, 49, 52, 63, 65, or 67, nor to affidavit paragraphs 19c, 19d, 19m, 19n, 19q, 19v, 20f, 20g or 20k. (Transcript pages .....). After plaintiff's counsel had cross-examined Dr. Samuels at considerable length with respect to the exhibit (Transcript pages 1986 ff., 2071 ff. and virtually all of cross-examination), defendant asked leave to withdraw the bottom portion of each page which purported to tie in the excerpt with the quotes and the affidavit paragraphs and to indicate consulting thereof by Millard or Eisenschiml. (Transcript pp. 2269-74). Plaintiff's counsel reserved the right to have costs and fees charged by reason of these circumstances. (Transcript p. 2274).

(82) During the course of the cross-examination of Dr. Samuels, it was brought out that in his book The
867 Young Henry Adams, there are numerous inconsistencies and errors of punctuation and grammar. (Testimony of Samuels, pp. . .....).

(83) Dr. Samuels testified that in his opinion, one of the elements of originality in the Millard article was his use of dreams, flights of fancy, and excursions into the occult. (Testimony of Samuels, transcript pp. 1899 and elsewhere). In Eisenschiml's book, Why Was Lincoln Murdered? (Plaintiff's Exhibit 1) there are also dreams, flights of fancy, and excursions into the occult, including the following samples:

(a) p. 16, par. 5, after break.

"Many peculiar things, which history has seen fit to overlook, happened in and around the presidential box that evening."

(b) p. 17, line 8, before break.

"One can visualize the pathetic figure of the patrolman . . . roaming the streets of the Capital. . . ."

(c) p. 137, last par., lines 2 and 3 on top and line 3 from bottom.

"It was almost as if an invisable guardian angel were watching over his (Booth's) every stop and shaping fortune in his favor . . . the Fates are kind to the fugitive. . . ."

(d) p. 3, last 2 lines.

"He (Lincoln) then told of a dream that had come to him during the night. . .

(e) p. 5, all, especially par. prior to last.

"Had anyone been able to read the significance of these two incidents, he would have recognized in them the shadow that all great events are said to cast before them. . ."

(f) p. 40, Title of Chapter "Premonitions. . . ."

(g) p. 40, line 5.

. . . he (Lincoln told . . . of a pitiful dream he had
868 had, in which he saw himself on a bier in the East room of the White House. . . ."

(h) p. 40, line 7.

"William Crook . . . . remembered that Lincoln had said goodbye to him instead of good night. . . ."

(i) p. 43, last 4 lines.

The Chief Executive suddenly turned to him (Crook) and said: "Crook, do you know, I believe there are men who want to take my life? . . . But if it is to be done, it is impossible to prevent it."

(j) p. 136, line 1 after break.

"Another bizarre feature in the story of Booth's pursuit is the failure of the War Department to prosecute some people. . . ."

(k) p. 155, last 2 lines before break.

". . . the only argument which apparently can be put forth in its favor is that, at times, truth is stranger than fiction."

(l) p. 61, line 5. Mention of Good Friday.

(84) Dr. Samuels testified that Millard deliberately crowded his story with unexplained mysteries. In fact Millard in several cases went out of his way unnecessarily to explain some of his mysteries as in the following:

Millard Article
Page 34—

(a) The mystery of "the gin-soaked prostitute" who was said to have been under suspicion of complicity in the assassination.

Page 117—
Column I
Top

This "mystery" is explained on page 117. "The frightened, drink-sodden — prostitute named Lizzie

Williams" had only been found soliciting and was promptly discharged.

869 Page 104 (b)
Column II
Par. 4

Millard tells of the mysteriously smashed lock on the door to box 8, but explains it a few lines farther down. The door had been kicked in by an employe of the theatre, who had mislaid the key.

Page 107 (c)
Column I
Par. 3

Booth looked around for . . . confederates — But what he got was a prize collection of dull-witted, fumbling, frightened inepts . . . (This is the mystery — how could he have succeeded in spite of this crew?) But Millard voluntarily explains the mystery:

Page 107—
Column I
Pars. 5, 6, 7,
8, 9

Herold "knew the back trail". John Surratt was young, alert . . . and familiar with the back' roads . . . Atzerodt owned a boat with which he ferried spies . . . across to the Confederate Shore . . . Lewis T. Powell . . . a little giant with terrific strength . . . to subdue the . . . still muscular Lincoln.

Page 108—(d)
Column I
Last 2 lines

Who was Parker? No one knows. (Then Millard answers in two-thirds of a column what "no one knows.")

Page 109—(e)
Column I
Par. 2

Where was Charles Forbes, Lincoln's valet? (Millard clears up the mystery at once. "Twenty seven years later — Forbes said he — was in the box when the assassin fired his fatal shot."

Page 109 (f)
Column I
Par. 4

But was he?

(This is mystery #2 about Forbes, and Millard dissipates it shortly. The journalist Hanscom reports, "There was no guard at the door . . . except Charles Forbes . . .)

870 Page 118—(g)
Column II
last 4 Pars.

(Here is a real mystery, and Millard offers an explanation for no apparent reason:) "But the . . . baffling conversation continued . . . each side oddly careful not to identify itself . . . There is one shockingly obvious answer to the whole crazy conversation, an answer that seems to have been overlooked by students." Here is the answer; given immediately: "Of course Booth knew these were Federal troops. What he was actually trying to discover was whether or not they were a picked squad, sent *to help him escape.*"

(85) Dr. Samuels testified that, while Millard tries to accentuate the mysteries, rather than explain them, Eisenschiml explains or attempts to explain them. In fact, plaintiff often leaves questions unanswered, mysteries un-

resolved, as in the following 41 examples (the page references being to Why Was Lincoln Murdered?)

(a) Page 14, end of top paragraph.

How then did a man of . . . Parker's character find his way into their select company? The answer to this query is as mystifying as the query itself.

(b) Page 14, bottom line.

What prompted the wife of the President to make this unusual request in behalf of . . . Parker will probably remain a moot question.

(c) Page 16, Paragraph 4 after break.

The minutes of this trial (of Parker) . . . would make one of the most interesting chapters in the story 871 of Lincoln's assassination.

(d) Page 18, Line 12

. . . It has remained one of the unexplained mysteries of those eventful days.

(e) Page 19, Last paragraph.

Curiously, no contemporary historian or journalist found it of interest to throw any light on . . . Parker and the part he played.

(f) Page 20, Center

Whose card was it that Booth handed to Parker? Was it that of some senator or other dignitary . . . ? Or did Booth have enough bravado to produce a card of his own? And what became of it? Did Parker keep it or not? Was there any writing on this . . . pasteboard? Did Booth speak to the guard, and if so, what did he say? These and other equally pertinent questions have never been answered.

(g) Page 28, last paragraph and par. 2, p. 29.

One cannot help wondering why Hanscom . . . was . . . so slow in furnishing an . . . account . . . who requested Hanscom to act as messenger? What be-

came of the letter? What could have been the contents of this document . . . ? . . . There is no answer to all this.

(h) Page 34, line 3 and next two paragraphs.
What can it mean that Stanton . . . testified under oath that Lincoln did not visit the War Department at all after April 13 . . . ? But William Crook . . . is . . . positive . . . in his assertion that he accompanied the President to the War Department (on) April 14. Which one of these two accounts is one to believe?

872 (i) Page 43, paragraph 2, from bottom
Neither Seward nor Hanscom nor anyone else ever found it expedient to disclose what information they possessed. The reason for this secretiveness is another matter left to the whims of speculation.

(j) Page 55, line 9 and last paragraph.
. . . Why Grant's sudden change of plans? . . . Grant was a queer mixture of human traits, and those who ascribe his sudden turn-about to his extreme modesty are . . . on debatable ground.

(k) Page 65, line 8.
It is difficult to understand why the first dispatch was not written out until 1:30 A.M.

(l) Page 66, line 5.
What is still stranger and more difficult to explain . . . is . . . that it failed to mention Booth's name.

(m) Page 72, last paragraph.
Here the unbiased observer must pause to catch his breath . . . Who can follow this reporter . . . that the name of the assassin could not aid in his capture . . ?

(n) Page 73, line 3.
The actions of L. A. Gobright, agent of the Associated Press, add to the strangeness of the situation.

(o) Page 75, paragraph before break.
The correct interpretation of this wire would make fascinating reading.

(p) Page 78, line 1 after break.
A bizzare incident on the night of April 14 was an interruption of all telegraph communications . . .

873 (q) Page 80, line 5.
. . . No investigation was ever made.

(r) Page 91, paragraph 2.
For unfathomable reasons it was deemed advisable to arouse first the northern and northwestern environs of the Capital.

(s) Page 105, after break.
Did the War Department really make possible Booth's flight by ignoring the Port Tobacco Road?

(t) Page 109, line 5.
How was it that not a single detective . . . thought it worth while to approach the Anacostia bridge . . . ?

(u) Page 111, line 17 from bottom.
But what — or who — caused him (Fletcher) to insert all those misleading statements into his testimony . . . ?

(v) Page 114, last line.
There is no explanation for General Augur's odd conduct.

(w) Page 128, last 2 lines.
It is significant that of all the telegrams pertaining to this matter, this one in particular is not on file in the War Department.

(x) Page 129, last paragraph.
Stanton's part in the matter is not so clear. Did he give due consideration to the fact that O'Beirne was already within striking distance of Booth . . . ?

(y) Page 132, first 3 lines.
How it was possible for these two strangers, one of them crippled, to escape . . . is an enigma.

(z) Page 134, after break.

A great deal of mystery surrounds the expeditions that finally overtook the fugitives at Garrett's farm.

874 (aa) Page 135, paragraph 1.

If Baker . . . did not get this clue from Major O'Beirne, from whom did he get it? The mystery is intensified, rather than penetrated by Baker's lawyer.

(bb) Page 138, paragraph 4.

No one knows just what the assassin meant by these words—

(cc) Page 144, before the break.

It is impossible to glean the truth from the contradictory statements of two such men.

(dd) Page 151, last paragraph.

Baker died on July 3, 1868 — According to — the Philadelphia Press — he died, "although he had been ill for several months the disease that proved fatal was . . . typhoid fever." His death certificate, however, . . . states that he died of meningitis.

(ee) Page 153, last paragraph and p. 154, line 5.

Tradition has it that the killing was done by Boston Corbett . . . No other soldier has ever came forward to say that he witnessed (it).

(ff) Page 155, after break.

Was it Colonel Conger who killed the cripple visitor. . . . ?

(gg) Page 157, paragraph 4.

Baker also could have been suspected . . .

(hh) Page 161 end.

Who was shot at Garrett's farm . . . ? No attempt to answer this query will be made within the confines of this book.

(ii) Page 174, end.

The grave question of who instigated Lincoln's assassination may hinge on the genuineness of the attempts on the lives of Grant, Stanton and Johnson.

875 (jj) Page 182, paragraph 4.

"At that time" wrote Captain W. R. Prentice . . . I am certain that some one played a practical joke on General Baker, the Secretary of War and General Sheridan". One wonders.

(kk) Page 209, line 3.

Was there some other secret information in the hands of the authorities about an assassination plot . . . ? If so, the facts have never been paid bare.

(ll) Page 286, center.

It is not known what means the agents . . . used with Wiechmann and Lloyd . . .

(mm) Page 434, line 1 after break.

The story of Stanton, as presented in the foregoing paragraphs is . . . of necessity strongly interwoven with presumed motives . . .

(nn) Page 437, first line.

From the records submitted in this volume, the story of Lincoln's assassination emerges in a state of confusion.

(oo) Page 462.

The whole chapter "The Mystery of Booth's Note to Johnson," is presented as a mystery without an acceptable solution.

(86) Dr. Samuels testified that the alleged borrowed material in the Millard article would not exceed some 5000 words (pp. 2479, 2480). This would make the
876 borrowings, according to him, between 20 and 25% of the total article.

(87) Plaintiff's counsel made an offer to prove, through Dr. Samuels, that Dr. Samuels believes a writer has the right to appropriate the research of another (p. 2305). Dr. Samuels testified that he would regard the Millard article as original even if Millard copied all 66 Quotes from Eisenschiml. (transcript p. 2026).

(88) Dr. Samuels testified that there were similarities of language but not identities in connection with Quotes 10 and 4 (Samuels testimony, transcript pp. 2323, 2324, 2022, 2023); that several times he recalled "collocations where you had, say 15 or 20 words, a sentence, in exactly the same expression, exactly the same order" (transcript p. 2325); that Millard probably took the final sentence in Quote 35 from Eisenschiml (Transcript pp. 2327, 2328, 2330); that he used Eisenschiml for other portions of his article (transcript pp. 2331, 2332); that it is probable that the historical information or source of it, in connection with Quote 7, was borrowed from Eisenschiml (p. 2347); that Quote 11 could be derived from Eisenschiml, including similarities of some of the language (pp. 2353-54-55); that as to Quote 17, there is a similarity of data, language and style (pp. 2381, 2382, 2383, 2385); that as to Quote 23, Millard got his data from Eisenschiml, based his story on this material, and that he got some of his language from Eisenschiml (pp. 2398, 2399, 2400); that he does not know anything in the Millard article that is not derived from Eisenschiml (p. 2407); that as to Quote 26, the similarity of language suggests that Millard had access to Eisenschiml (p. 2411); that as to Quote 27, as well as other quotes, Millard was in-
877 debted to Eisenschiml for his factual material (pp. 2418-2419); that as to Quote 29 there is a similarity of thought and "one could be a paraphrase of the other," a probable inference being that Millard got it from Eisenschiml (pp. 2427, 2428); that Quotes 34 and 34A are among Eisenschiml's contributions to knowledge (p. 2434); that as to Quote 37, the source would be Eisenschiml (p. 2437)—"that would either be an imitation of language or because the material was similar" (p. 2438); that it would be a fair inference that Millard used Eisenschiml as the source for the two quotations (p. 2439); that

there is some similarity or identity of phrasing in Quote 40 (p. 2440); that the source of Quotes 47 and 48 is Eisenschiml (pp. 2443-2445); that one of the important historical sources to which Millard is generally indebted is Eisenschiml (p. 2450); that "the language (in Quote 49) is closely similar," and it is a fair inference that Millard took the language from Eisenschiml (p. 2451); that as to Quote 64, presumably the historical fact is taken from Shadow (p. 2001); that Bryan's Great American Myth says nothing with respect to a police blotter (Quote 24 and sub-paragraph 19 of Plaintiff's Affidavit) (p. 2203); that Crook's Through Five Administrations is not a source for Quotes 13, 14 and 15 (p. 2207); that since there is no reference in Bryan to anyone named Burns, Millard could not have derived his material about Burns from Bryan (p. 2298); that since Millard is an unpublished portion of his article referred to Eisenschiml in connection with a particular passage, it is a reasonable possibility that he took other things from Eisenschiml (pp. 2302, 2303); that Parker is one of the important figures in the Lincoln assassination story (pp. 2055, 2063); and that some of this material helps make the Millard article more interesting (p. 2064); that the Parker 878 story may well have been drawn from Eisenschiml (p. 2149); that Millard is indebted to Eisenschiml for most, if not all, of the factual details on Parker (p. 2177); that some of Millard's research was done using Eisenschiml's works (p. 2083); that there were some similarities of ideas, of factual detail, so that it would appear that Eisenschiml's work had been used as a literary and historical source (p. 2084); that there are similar details in Millard and Eisenschiml which are included in the sixty-six quotes (pp. 2106, 2107); that there are similarities set forth in most of the subparagraphs 19 and 20 of Plaintiff's Affidavit (pp. 2116, 2115); that there are

similar words and data in Quote 13 (p. 2165, 2167); that it is unlikely that Millard went to the Whig Press for the information in Quote 3 (pp. 2180 to 2183); that he would regard it as significant that Millard quotes only the same instances of premature publication and reports as Eisenschiml in Quotes 1, 2 and 3 (p. 2016).

(89) The following is a comparison of Millard's treatment of Lincoln with Eisenschiml's:

MILLARD	EISENSCHIML
(a) Page 36, column I, line 16.	Why? Page 40, line 5.
He (Lincoln) had had a dream — I heard subdued sobs. . . . I arrived at the East Room. . . . Before me was a catafalque. . . . "Who is dead in the White House?" I demanded. . . . "The President," . . . "He was killed by an assassin."	Only a few days prior to his death he (Lincoln) had told . . . of a pitiful dream he had had, in which he saw himself on a bier in the East Room of the White House, the victim of an assassin.
(b) Page 105, column I, line 15.	Why? Page 3, line 5.
At 11 o'clock that morning Lincoln went to a cabinet meeting. . . . He met General Grant. . . .	In the forenoon a regular meeting of the Cabinet was held, at which General Grant was present . . .
(c) Page 105, column I, par. 2 after break	Why? Page 3, last 2 lines.
He (Lincoln . . . told them of a dream . . . that had oc- 879 curred several times . . . each of its previous occurrences had been followed by some important event. . . .	He (Lincoln) then told of a dream that . . . had so often in the past presaged a portent or happening.
(d) Page 106, column I, par. 3.	Why? Page 43, line 7 from bottom.

MILLARD	EISENSCHIML
. . . Lincoln called Crook, the guard, to walk with him to the War Department. . . . "Crook, do you know, I believe there are men who want to take my life . . . and I have no doubt they will do it. Other men have been assassinated. . . . I have perfect confidence in those who are around me. . . . I know no one could do it and escape alive. But if it is to be done, it is impossible to prevent it."	Crook, one of the President's body-guards, wrote . . . that when he accompanied Lincoln to the War Department . . . the Chief Executive turned to him and said, "Crook, do you know, I believe there are men who want to take my life." . . . And I have no doubt they will do it. . . . Other men have been assassinated. . . . I have perfect confidence in those who are around me. . . . I know no one could do it and escape alive. But if it is to be done, it is impossible to prevent it."
(e) Page 106, column I, par. 6.	Why? Page 33, line 6.
Lincoln went on into the War Department. . . . He asked for a bodyguard. "Stanton," he said, "did you know Major Eckert can break a poker over his arm? . . . I am thinking . . . he would be the kind of man to go with me this evening. May I take him?"	. . . the President paid one of his usual visits to the War Department . . . he asked Stanton to let him have . . . Major Thomas T. Eckert as escort. . . . "I have seen Eckert . . . break fire pokers . . . over his arm . . . and I am thinking he would be the kind of man to go with me this evening. May I take him?" . . .
Stanton flatly refused. . . . Lincoln strode into the cipher room, putting his half-joking, half-pleading request directly to Eckert.	Stanton refused point blank. . . . Lincoln went into the cipher room, and . . . repeated his request . . . Eckert also . . . refused . . . "I

MILLARD	EISENSCHIML
And Major Eckert declined. Lincoln . . . turned away. "Then I shall take Major Rathbone along. . . . But I would much rather have you, Major, since I know you can break a poker over your arm."	shall take Major Rathbone along," he (Lincoln) said . . . "but I should much rather have you, Major, since I know you can break a poker over your arm."
(f) Page 105, column II, par. 2 after break.	Shadow, Page 5, par. 3, line 12.
He (Lincoln) complained that a military escort . . . made so much noise . . . that he could neither talk . . . nor hear himself think.	The burden of his (Lincoln's) complaint was that he and Mrs. Lincoln would not hear themselves talk for the clatter . . .
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MILLARD, Page 111, Col. 2, par. 4.	EISENSCHIML, Shadow, p. 351, line 1, p. 353, last line before break.
(g) The world knows when Lincoln died, but oddly no one knows the time when he was shot. . . . The time usually accepted is 10:13. . . .	It is known to a second when Lincoln died . . . No one, however, has recorded the exact time when Lincoln was shot. . . . It is therefore safe to say that Booth fired his shot at or close to 13 minutes past 10 P.M.

(90) The following is a comparison of Millard's treatment of General and Mrs. Grant with Eisenschiml's:

MILLARD	EISENSCHIML
(a) Page 37, column I, 2nd par. from bottom.	Why? Page 54, beginning.
It was Lincoln himself who had suggested that Grant and his wife be included in	The President and Mrs. Lincoln had invited Mr. and Mrs. Grant to be their guests

MILLARD	EISENSCHIML
the theater party. The invitation had been sent and accepted.	at Ford's Theater on Friday night, and the General had accepted the invitation.
(b) Page 105, column II, par. 4.	Why? Page 61, line 10.
His voice . . . was almost pleading. The general shook his head firmly. . . .he hurried off, leaving the chief . . . to stare after him with an expression of deep hurt. . . .	Lincoln felt the affront keenly. He hinted at it rather strongly as Grant took his leave. But apparently his plea fell on deaf ears.
(c) Page 105, par. 6, Col. II.	Why? Page 56, line 1.
In his memoirs, Grant skillfully slid over the incident with the excuse of much work to be done and an overwhelming desire to see his children.	In his memoirs, Grant passed over this episode quickly and skillfully . . . if able to finish his work early, his intention was to join his children. . . .
(d) Page 105, par. 6.	Why? Page 57, last par.
As to work, he did almost nothing during his brief stay in Washington.	What about Grant's work . . .? his activity consisted of sending a single telegram to General Meade. . . .
(e) Page 105, par. 6.	Why? Page 56, line 5.
In those same memoirs he forgot himself to the extent of remarking that by the 13th his work was practically finished.	Grant himself admitted as much when he wrote that by the 14th "I was pretty well through with this work."
	Why? Page 58, line 3.
	. . . his work was . . . practically finished.
881	
(f) Page 105, Col. II, par. 7.	Why? Page 56, par. 2.
What of his very natural yearning to rejoin children.	Can one really believe that Grant's longing for his chil-

MILLARD	EISENSCHIML
so long separated from their father? . . . But Grant had just returned from City Point, not too far from Burlington.	dren was so irresistible? . . . Burlington was only a . . . short distance from City Point.
(g) Page 105, column II, par. 8.	Page 56, par. 2, line 7.
And that 6 o'clock train he took! It was a Camden and Amboy local, requiring two wearisome changes during the night. . . . He could have gone to the theater, taken an early-morning express and reached Burlington in comfort at 2:58 in the afternoon.	. . . the evening train which the Grants took from Washington at six PM was not due in Burlington until early in the morning. All that they stood to gain by suffering the discomforts of a night train . . . and making two transfers at very inconvenient hours, was that they would see their children in the afternoon. (A following time-table shows the arrival time at 2:58 P.M.)
	Page 57, par. 1.
More likely the War Department would have supplied the General with a special train. . . .	. . . or even a special train might have been allotted to him. . . .
(h) Page 105, column II, after break.	Page 57, par. 2, line 7.
Apologists blame Mary Lincoln. . . . Twice the sensitive Julia had been publicly humiliated by Mrs. Lincoln's outbursts of shrieking jealousy. The prospects of risking another crazy tantrum in	. . . His wife was still to be reckoned with . . . Mrs. Grant was a woman of . . . refinement . . . she must have had very sound reasons for her actions.
	Page 58, par. 2, after break.

MILLARD	EISENSCHIML
a crowded theater could have offered no pleasure to Grant's wife. But the day has not yet come when an Army	It so happened that a few weeks previously Mrs. Grant had been hostess to Mrs. Lincoln . . . (who) flew into a rage . . . and could be pacified . . . with difficulty. Page 59, line 7. . . . it is no wonder that Mrs. Grant did not enjoy the prospects of an evening in the same loge with the Lincolns, . . . but this by no means settled the matter for her husband . . . what was merely a social affair for his wife took on the character of an official function for him.

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(91) The following is a comparison of Miliard's treatment of Booth with Eisenschiml's:

MILLARD	EISENSCHIML
(a) Page 107, column I, par. 2	Shadow, Page 8, par 2, line 7.
Booth's original plot (to kidnap the President) against Lincoln was fantastic but not necessarily unworkable . . . Here was an accepted . . . strategy of war . . . From a legal standpoint, it was not a crime.	To many, the abduction of a President . . . may have seemed preposterous. Shadow, Page 16, last line. A successful abduction . . . would not have been contrary to the laws of civilized warfare.

MILLARD	EISENSCHIML
(b) Page 107, column I, par. 3 ff	Shadow, Page 9, last par.
Booth looked around for confederates. Samuel Arnold and Michael O'Laughlin were former Maryland school-mates. David Herold ... loved to hunt and knew the back trails and rabbit runs of the country below Washington.	Samuel Arnold and Michael O'Laughlin were trusted school-mates of Booth . . . Herold . . . had spent many a day hunting among the cross-roads of the Potomac country and knew strange hiding places.
(c) Page 107, column I, par. 2 prior to break	Shadow, Page 9, last par.
... John Surratt ... carried many dispatches between Washington and Richmond ... (and) was familiar with the backroads through the Virginia wilderness.	John Surratt . . . had an intimate knowledge of southern Maryland, where he had often traveled as a Confederate dispatch bearer.
(d) Page 105, par. after break	Atzerodt owned a boat . . . and was well versed in illicit traffic.
. . . Atzerodt owned a boat with which he ferried spies, smugglers and couriers across. ...	
Powell was ... a giant with the strength to subdue the huge and still-muscular Lincoln.	Lewis Paine (Powell) . . . with his gigantic strength, was to have subdued the powerful Lincoln.
(e) Page 113, column I, par. 1	Why? Page 96, line 7
If he (Booth) could cross ... the Potomac ... he would be on the open road to ... Port Tobacco and the possible safety of the South. It	Only one hole was left . . . This was the road that pointed straight south from Washington to Port Tobacco. It was the road Booth

MILLARD	EISENSCHIML
was the one easy, direct and wholly logical escape route ...	was most likely to use, for it led toward the Confederacy, the only place where the assassin could hope to find protection.
883	
(f) Page 113, column I, par. 1	Why? P. 107, par. 2.
Booth rode boldly and calmly up to that sentry post and was challenged by the sergeant of the guard, Silas T. Cobb.	A Sergeant Cobb, who was in charge at the ... bridge, had questioned Booth, and after a brief conversation, had let him pass.
(g) Page 113, column I, par. 5.	Why? Page 97, line 1.
So ... Booth was swallowed up by the darkness of the night.	When Lincoln's assassin had been swallowed up by the darkness of the night ...
(h) Page 116, column I, line 1.	Why? Page 97, last par.
There was no wild, panting flight ... for the fugitives ... the two were riding openly along one of the best known unofficial highways—the advertised route of spies and couriers between Washington and Richmond.	The only likely route for Booth to take was the one he actually followed. It was what was then known as the underground railway to Richmond, and was traveled by spies and dispatch-bearers. ...
(i) Page 116, column I, after break	Why? Page 171, center.
... Booth was supposed to have shouted back to Lloyd, "I am pretty certain that we have assassinated the President and Secretary Sew-	... Lloyd ... quoted one of them (the assassin) as saying, "I am pretty certain that we have assassinated the President and Secretary

MILLARD	EISENSCHIML
ard." ... By not mentioning any other Cabinet member, he implied that no plot against any others existed.	Seward." Not one word about Johnson. If the latter's death had been included . . . how could they be so sure . . . that Johnson was unharmed?
(j) Page 116, column II, par. prior to break Herold explaining that they were headed toward Washington. ... They were riding south, Herold admitted, but only to reach the Potomac in the hope of finding a boat headed north.	Why? Page 258, center. Herold tried to (explain) that they were on the way to Washington, . . . they were headed south. The fugitives were in a hurry to reach the Potomac, going south, Herold claimed, that they might find a boat to take them back north. . . .

(The fugitives are finally cornered in Garrett's barn.)

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(k) Page 118, column II, pars. 4&5 The accepted story (is) that the one door of the barn was padlocked ... It is significant, then, to discover that double doors were on all 4 sides ... The authority for that is Wm. Garrett, and his brother added the information that 'there were doors that fastened on the inside.'	Shadow, Page 70, last par. & page 71, top. According to this testimony there was only one door . . . The Rev. Richard B. Garrett . . . states that double doors were on all 4 sides . . . Wm. H. Garrett . . . confirms . . . there were doors that fastened on the inside.
Par. 6 — Two years afterward Lieutenant Baker ...	Page 71—Lieutenant Luther B. Baker (said) 'Only one

MILLARD	EISENSCHIML
said, 'Only one door of the barn was opened ...'	door of the barn was opened.'
(l) Page 119, column I, par. 2 after break	Shadow, Page 55, line 8 from bottom.
They brought the dying man out and laid him on the Garrett porch. He opened his eyes, murmuring, "kill me, oh kill me!" Baker answered, "No Booth," "When I said 'Booth', Baker testified afterward, 'he seemed surprised, opened his eyes, and looked about.' Would a dying man be surprised at hearing his own name spoken?	When Baker described how the dying man had been ... laid on the porch of the Garrett home, he made a startling remark, "He opened his eyes," Baker swore, "and seemed to realize what was going on. The first words he uttered were 'Kill me, oh, kill me!' I said, 'No Booth.' *When I said 'Booth'*, he seemed *surprised* ... What can be the meaning of this? A dying man hears his name mentioned ... and acts surprised.
(m) Page 119, column II, after break	Shadow, Page 73, bottom.
Lafayette Baker, grinning harshly would soon be remarking to a friend, "I intended to have his body, dead or alive, *or a mighty good substitute for it.*"	He (Lafayette Baker) smiled, and said ... "*I intended to have his body, dead or alive, or a mighty good substitute* for it. ..."
(n) Page 119, column II, lines 3, 4	Page 157, center.
It is interesting to note that when the rewards were finally paid, Luther Baker got $3000.00. And Lt. Col. Everton J. Conger got $15,000!	It is interesting to note that Conger received the lion's share of the final reward paid out — $15,000 — while Lt. Baker was given only $3000.00.

(92) The following is a comparison of Millard's treatment of John F. Parker with Eisenschiml's:

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MILLARD	EISENSCHIML
(a) Page 108, column I, bottom	Why? Page 14, end of par. 1.
Who was Parker? How did he get a post of such responsibility?	How then, did a man of John F. Parker's character find his way into this select company?
(b) Page 108, column I, top	Why? Page 11, last line.
Parker was, that night, a month short of 35. Born in Frederick County, Virginia, he had been a carpenter around Washington, had served three months with the Union Army in 1861, and had then joined the Metropolitan Police Force. He lived at 750 L Street with a wife and three children.	Parker was born on May 19, 1830, in Frederick County, Virginia. He later became a carpenter in the city of Washington, and enlisted in the army shortly after the outbreak of the war. When the Metropolitan Police Force was organized in September, 1861, he became one of its first patrolmen. At that time he was married, had three children, and lived at 750 L Street.
(c) This John Parker was something less than a model patrolman.	His record as a police officer is not one that inspires great confidence.
(d) On October 14, 1862, he was on trial before the Police Board for using profane, coarse, and insolent language ...	About a year after joining the Force, he was charged ... with the use of violent, coarse and insolent language.

MILLARD	EISENSCHIML
(e) to a grocer who tired of running a rest room for lazy police	The owner of a grocery store had complained that officers were . . . loafing in front of his establishment.
(f) He was also accused of violent and disrespectful language to superior officer who investigated.	"The language he used," says the report (of the Police Board) "was exceedingly violent and disrespectful . . ."
(g) For these Parker was "punished" by a reprimand and transfer to another precinct.	. . . he was reprimanded and transferred to another precinct.
(h) . . . a few days later, . . . he was found asleep on a street car instead of walking his beat, and freed on the ingenious defense that he had gone aboard to in- 886 vestigate the squawking of ducks.	. . . a fortnight later, he was accused of being found asleep on a street car when he should have been walking his rounds; but the charges were dismissed upon Mr. Parker's statement that he . . . had heard the squawking of ducks and . . . had entered the car to ascertain the cause.
(i) In April 1863, we find Parker on trial again, this time charged with being drunk and disorderly in a house of ill fame operated by one Annie Wilson, and with having fired his pistol	Why? Page 12, par. 2. On March 16, 1863, Parker again found himself before the Police Board. . . . This time he was accused . . . of having visited a house of prostitution, kept by a Miss

MILLARD	EISENSCHIML
through a window of that establishment. In his defense Parker paraded ... a crew of her girls as witnesses. They all testified warmly to the good character of John Parker, one girl going so far as to cry indignantly that John had been staying at the bawdy house for five weeks and had never once been seen drunk.	Annie Wilson . . . and that he had fired a pistol through the window. . . . The witnesses, employees of the house in question, proved staunch champions for the defendant, one of them going so far as to declare that he had never in his life seen Parker drunk, "and he had been in that house for five weeks."
(j) His (Parker's) name appeared (on the records) ... when he was examined by a police doctor after being kicked by a man he was trying to arrest.	Why? Page 13, 2nd par. from bottom. ... Parker received a severe kick from a man he was endeavoring to arrest, and therefore the incident is ... in the records ...
(k) On April 3, 1865, ... Mrs. Lincoln wrote a note on White House stationery to Provost Marshall James R. O'Beirne: This is to certify that John F. Parker, a member of the Metropolitan Police has been detailed for duty at the Executive Mansion by order of Mrs. Lincoln.	In a letter written by her (Mrs. Lincoln) to James R. O'Beirne, provost marshal, she asked: This is to certify that John F. Parker, a member of the Metropolitan Police has been detailed for duty at the Executive Mansion by order of Mrs. Lincoln.
(l) Page 117, column I, top John Parker had vanished after the assassination. Where he went or what he	Why? Page 17, par. 1, after top. What Parker did immediately after the assassination has not been definitely ascer-

MILLARD	EISENSCHIML
did to soothe his guilt-ridden soul that night, nobody knows. But at 6 o'clock Saturday morning he stumbled into Police Headquarters towing a suspect — ... a prostitute named Lizzie Williams ... Lizzie was promptly discharged.	tained. The police blotter ... shows that at 6 AM ... Parker brought to headquarters a woman by the name of Lizzie Williams ... One can visualize the ... patrolman ... roaming the streets ... as an atonement ... Parker brought in a woman of the streets who ... was promptly discharged.

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(93) The following is a comparison of Millard's treatment of O'Beirne with Eisenschiml's:

MILLARD	EISENSCHIML
(a) Page 116, column II, par. 8 after break	Why? Page 119, last par.
These four (detectives of O'Beirne) were certain the strangers had been Booth and Herald, but by keeping quiet they hoped to make the capture themselves ...	(Statement by the leader of the four O'Beirne detectives) I was under the impression that Booth and Herold were in the neighborhood and ... we would get the whole of them ...
(b) Page 117, column II, line 6	Why? Page 123, line 1.
Major James O'Beirne ... had been scouting ... when he picked up a clue ... It was a false trail, but in following it, O'Beirne ... stumbled onto the real trail ... and came within a hairbreath of capturing them.	O'Beirne, following the wrong men, stumbled on the track of the assassins by accident, and had he held to it ... would probably have captured them.

MILLARD	EISENSCHIML
(c) Page 117, column II, par. 3 after break	Why? Page 120, par. 3.
... O'Beirne was writing in his journal, "Sam'l Cox. His mill servant states to another colored man that Cox had been cooking provisions lately, and carrying them to persons down in the swamp. ..." That close, O'Beirne came to making his capture.	In a diary which (O'Beirne) kept . . . there is an entry . . . ! "Sam(ue)l Cox. . . . His mill servant states to another colored man that Cox had been cooking provisions lately and carrying them down in the swamp . . ." That close O'Beirne came to getting his man.
(d) Page 118, column I, par. 3 prior to break.	Why? Page 122, last par.
Captain Beckwith, Grant's chief telegraph operator, ... had been sent to Port Tobacco ... to open a telegraph station. O'Beirne made the error of telling Beckwith what he had found out so far. The ... operator promptly cut into the Washington line and flashed the whole story to Stanton. Back came a prompt and, to O'Beirne, bewildering reward for his zeal — a flat order from Stanton to remain on the Maryland side ...	When Major O'Beirne fell in with Captain Beckwith at Port Tobacco, he gave Grant's telegraph operator a survey of his achievements. . . . This officer . . . cut into the telegraph lines . . . to Washington and gave to the War Department the gist of the information. . . . One can imagine his (O'Beirne's) surprise . . . when orders came over the wire to . . . remain on the Maryland side . . .

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(94) The following is a comparison of Millard's treatment of Miss Harris and Major Rathbone with Eisenschiml's:

MILLARD	EISENSCHIML
(a) Page 108, column II, par. 5 from bottom	Why? Page 22, par. 1.
The carriage made one stop, at the home of Senator Ira Harris of New York.	The presidential carriage left the White House. . . . Ten minutes later, it arrived at the residence of Senator Harris.
(b) Page 110, column, I, par. prior to break	Why? Page 25, par. 5.
Later that night Clara Harris gave her sworn statement. "Nearly one hour before the commission of the deed the assassin came to the door of the box, and looked into take a survey of the position of the occupants. It was supposed at that time that it was either a mistake or the exercise of an impertinent curiosity. The circumstance attracted no particular attention at the time. Upon his entering the box again, Major Rathbone arose and asked the intruder his business. He rushed past the Major without making a reply, and fired . . ."	In a statement made (by Miss Harris) . . . she reported that, "Nearly one hour before the commission of the deed the assassin came to the door of the box, and looked in to take a survey of the position of its occupants. It was supposed at the time that it was either a mistake or the exercise of an impertinent curiosity. The circumstance attracted no particular attention at the time. Upon his entering the box again Major Rathbone arose and asked the intruder his business. He rushed past the Major without making a reply, and . . . fired . . ."

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NOTE: In the original article in the New York Herald the last sentence reads like this:

"He rushed past the Major without making a reply, and *placing his pistol close to the back of the President's head, actually in contact with it,* fired, *and instantly sprang upon the cusioned baluster of the box* . . ." (Italics supplied.)

Millard omitted the same italicized portions from his account as Eisenschiml, and broke off at the same spot Eisenschiml did.

(c) Page 110, column I, after break

The statement should have aroused feverish interest, but it didn't, for the simple reason that Clara Harris made another statement a couple of days later and *left that part completely out* . . . was she quietly gagged?

Why? Page 26, line 6

What makes Miss Harris' statement . . . doubly remarkable, is that it differs so radically from (her) sworn statement . . . two days later. Then she made no mention of the . . . visitor. . . . She must have forgotten the man . . . completely . . . or was it something other than forgetfulness . . . ? . . . Miss Harris probably was easily influenced . . .

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MILLARD EISENSCHIML

(d) Page 120, column II, par. II after break

Shadow, Page 395, note 34.

Major Rathbone . . . recovered physically, but not mentally. He married Clara Harris . . . and she bore him

Rathbone's mind had probably been affected by the murder . . . (he) married Miss Clara Harris . . . there

MILLARD	EISENSCHIML
children ... A few years later he too went mad and murdered his wife. His efforts to kill the children were thwarted and he ended his miserable days under restraint as a violent maniac.	was a daughter . . . and two boys. On the night of December 23, 1883 . . . Rathbone suddenly attacked and killed his wife . . . and tried to enter the children's bedroom . . . Rathbone was taken to the hospital for the criminally insane, . . . where he lived until 1911.

(95) The following is a comparison of Millard's treatment of John Fletcher with Eisenschiml's:

MILLARD	EISENSCHIML
(a) Page 113, column II, par. 1 after break	Why? Page 107, par. 1
John Fletcher ... rented a roan mare to Herold ... with the express stipulation that it must be returned not later than 9 o'clock. ... When 9 o'clock passed . . . Fletcher went out ... saw his quarry riding ... Herold spurred around and raced off.	John Fletcher . . . had become suspicious of . . . Herold . . . who was riding a horse from the livery stable for which Fletcher worked, and had stayed out beyond the time . . . agreed upon . . . Fletcher happened to see his animal being spurred on . . .
(b) Page 114, column 1, par. 2 after break	Why? Page 110, line 3
"I then returned to the stable, put up the horse, came outside the office-window, and sat down there; it was half-past 1 o'clock."	"I then returned to the stable," swore Fletcher in court, "put up the horse, came outside the office window, and sat down there; it was half-past one o'clock."

MILLARD	EISENSCHIML
(c) Page 114, column I, par. 2 from bottom	Why? Page 110, par. 3
In the testimony that failed to reach print, Fletcher told how, seated in front of his stable, he heard passers-by talking of the assassination "and they were saying that it was men riding on horseback that had shot President Lincoln."	. . . the interesting part of his (Fletcher's) story begins where Pitman's report leaves off. Fletcher continued . . . by saying that he overheard people on the sidewalk saying "that it was men riding on horseback that had shot President Lincoln."
890	
(d) Page 114, column I, last par.	Why? Page 114, par. 1 after break
Fletcher ... told his story to a detective named Charley Stone. Stone immediately took him straight to the headquarters of General C. C. Auger ...	Fletcher then . . . went in company with a city detective named Stone to General Augur's headquarters.
(e) Page 114, column II, top	Why? Page 113, center
To Auger himself, Fletcher described Herold and his horse. He was shown a saddle and bridle recently picked up and at once identified it as the one rented by Atzerodt, but he could not ... think of Atzerodt's name. .... accompanied by the detective, Stone, he went back to the stable, got Atzerodt's name off a rental card, and took it back to Auger.	"General Auger asked me . . . I gave him the name of Herold, his description, . . . There was a saddle and bridle lying close to the desk . . . and that was Atzerodt's . . . He asked me did I know that man's name. I told him that I did not . . . but I had it at the office. He sent the detective, Stone with me . . . I . . . got his name right upon one of our cards . . . and gave it to the general."

MILLARD	EISENSCHIML
(f) Page 114, column II, after break . .	Why? Page 110, last 2 pars.
His (Fletcher's) testimony placed him near the Navy Yard bridge at ten minutes to 12 ... But on the blotter of the ... Police ... is a list of people who appeared that night ... According to that record, John Fletcher was at police headquarters ... between 11 o'clock and midnight.	According to (Fletcher's) testimony . . . he did not go to the police station until after one-thirty A.M., while the police records mark the time of his appearance at headquarters before midnight.

(96) During the trial of this cause, including the taking of the Millard deposition, defendant arranged three mass displays of its alleged evidence: (a) a large number of books and other printed matter, at first claimed to be sources used for the Millard article, and then minimized by Millard himself to not more than a dozen items, perhaps less (b) a series of alleged source cards, ultimately admitted as not necessarily listing the sources actually used by Millard in connection with his article; and (c) a long compilation of excerpts from alleged sources utilized by Millard, which turned out as not in point when the cross-examination of Dr. Samuels 891 was concluded. In addition, defendant introduced in evidence an array of books and magazine articles, having little, if anything, to do with the issues of the case. Plaintiff objected, and objects, to the said mass displays, the testimony in connection therewith, and the documents introduced in evidence.

(97) Plaintiff objected, and objects, to the introduction of certain documents into evidence in connection with the depositions of Joseph Millard and Ralph Daigh:

(a) Defendant's Exhibit 3 of March 25, 1954—the contract dated January 30, 1952, between Millard and Fawcett Publications, Inc. (for the reason, among others, that the contractual relations between the said two parties could have no relevancy with respect to the rights and obligations of the plaintiff and defendant with respect to each other).

(b) Defendant's Exhibit 7—the cards prepared by Millard for the purposes of his deposition (for the reason among others, that the cards are self-serving and admittedly the sources set forth in the cards are not the same as those consulted for the article itself).

(c) Plaintiff's Exhibit 5 of March 26, 1954. Letter from Eisenschiml to Millard dated July 26, 1946. (This letter being marked only for identification and not with the intent of having it received in evidence, as it has no tendency to prove any of the issues of this case).

(d) Plaintiff's Exhibit 6 of March 26, 1954.—Stranger's Pocket Companion. (This book being marked only for identification and not with the intent of having it received in evidence, as it has no tendency to prove any of the issues of the case).

892 (98) Plaintiff objected, and objects, to the introduction of certain other documents into evidence:

(a) Defendant's Exhibit 3—the contract dated January 30, 1952, between Millard and Faweett.

(b) Defendant's Exhibit 4—article by Millard, The Spy Who Saved The Country (for the reason, among others, that it had no tendency to prove any of the issues of this case).

(c) Defendant's Exhibit 8—the letter from Eisenschiml to Millard of July 26, 1946 (for the reason, among others, that it has no tendency to prove any of the issues of the case).

(d) Defendant's Exhibit 9—the sample notes of Millard.

(e) Defendant's Exhibit 10—the deposition of Ralph Daigh—certain portions thereof as enumerated on p. ..... of the transcript are objected to; the rest of the deposition was offered in behalf of the plaintiff.

(f) Defendant's Exhibit 12 — book called The Day Lincoln Was Shot, by Jim Bishop (for the reasons, among others, that this is a book that was published long after the present suit was started, and was the subject of another claim by plaintiff which has been settled amicably by the parties through a cash payment to plaintiff and other arrangements; and the book has no tendency to prove any of the issues of this case).

(g) Defendant's Exhibit 13 — Blue Book for February 1955 (for the reasons set forth in (f) hereinabove).

(h) Defendant's Exhibit 4 of May 16, 1955, the volume of alleged source material for the reasons, among others, that no foundation of any kind was laid therefor, the one witness—Dr. Samuels—questioned about it, disclaimed all responsibility therefor, and there is no evidence of the relevancy of any portion thereof).

893 (i) Defendant's Exhibits 1, 2 and 3 of May 27, 1955—three works of Eisenschiml (for the reason that they have no relevancy in proving any of the issues hereof).

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894 • • •

895 SPECIAL MASTER'S FINAL REPORT

REPORT OF JOSEPH A. GRABER, SPECIAL MASTER IN CHANCERY, WITH RESPECT TO THE OBJECTIONS FILED TO HIS REPORT BEARING DATE OF DECEMBER 27, 1955

(Filed Jan 20 1956)

I, Joseph A. Graber, Special Master in Chancery for the United States District Court for the Northern Dis-,

trict of Illinois, Eastern Division, do further report that on the 27th day of December, 1955, I prepared my Report in the above-entitled cause; that on the 28th day of December, 1955, I caused a copy of said Report to be served on all attorneys of record herein by the Clerk of the Court; that subsequently I fixed the 23d day of January, 1956, as the last day upon which to file objections to said Report, and the 23d day of January, 1956, as the time when arguments of counsel with respect to any and all objections would be heard.

The plaintiff, Otto Eisenschiml, filed on January 4, 1956, his objections numbered 1 to 16, both inclusive, to said Report and said objections have been filed with the Clerk of the Court.

896 On the 11th day of January 1956, I received a letter from counsel for the plaintiff rejecting an opportunity to argue plaintiff's objections. A copy of that letter together with the defendant's reply is attached hereto. Since the plaintiff does not wish to argue objections to my first Report, I have refused Defendant's offer to do so. Accordingly, without hearing any argument, I read plaintiff's objections and re-read and studied the entire record herein. After giving due and careful consideration and attention to each and all of said objections, I do further and finally report as follows:

First: That the fourth objection of the plaintiff is sustained and the fourth paragraph of page two of my prior Report is hereby amended to read as follows:

> "Included in the evidence submitted by me are the depositions of Joseph Millard, Mrs. Joseph Millard and Ralph Daigh. The depositions of Millard and Daigh were taken by the parties in New York City prior to the reference while the deposition of Mrs. Millard was taken upon written interrogatories and

cross-interrogatories in Sarasota, Florida, after the order of reference."

Second: That the ninth objection of the plaintiff is in part sustained and the next-to-last line of Paragraph 19 appearing on page 12 of my prior Report is amended to read as follows:

"As a result of this work Millard was asked to address the Civil War Round Table of Chicago, an organization of men interested in, and informed in varying degrees about, the American Civil War."

Third: That as to the fifth objection, I am familiar with the exhibits referred to therein as I examined the bulk of them during the hearing herein, and further I examined the appropriate portions of the transcript
897 of the record dealing with the subject-matter of most of said exhibits at the time I prepared my Report. Subsequent to receiving plaintiff's objections, however, and on January 6, 1956, I caused the Clerk of the Court to deliver to me all of the exhibits described in Objection No. 5 that were filed with the Clerk.

Plaintiff's Exhibit #4—

Photographs of Booth's escape route taken by plaintiff in April of 1933.

Plaintiff's Exhibit #15—

A copy of Joseph Millard's article, America's Greatest Unsolved Murder.

Plaintiff's Exhibit #20—

An analysis of Millard's article appearing in the February 1953 issue of True made by the plaintiff, Otto Eisenschiml, and bearing the heading, "Overall Plagiarism of Millard's story". The bulk of this document was read by plaintiff into the record.

Plaintiff's Exhibits #21, #22, #23—

Copyright certificates and appropriate assignments thereto which disclose the plaintiff has received from the appropriate Government agency copyright certificates for his two works.

Plaintiff's Exhibit #24—

A copy of a letter dated March 12, 1953, sent by plaintiff's attorney to one of defendant's offices.

Plaintiff's Exhibit #25—

A cover from the January 1954 issue of True magazine.

Plaintiff's Exhibits #27, #27A, #28, #29, #29A—

Copies of historical material in the possession of the plaintiff and apparently used in the preparation of plaintiff's books.

Plaintiff's Exhibits #30, #31—

Parallel analyses of portions of plaintiff's work and Millard's article.

Plaintiff's Exhibit #32—

An article dealing with the escape of Booth and written by a third person in 1946.

898 My prior Report is hereby amended to reflect the fact that I have now received, read and considered these exhibits and that none of said exhibits changes the conclusions and recommendations heretofore reached by me.

Fourth: That each and every one of said remaining objections filed herein by the plaintiff are without merit and are hereby overruled.

Respectfully Submitted this 20th day of January, A. D. 1956.

Joseph A. Graber
Special Master

899

Law Offices
ELMER GERTZ
January 10, 1956

Honorable Joseph A. Graber
Kirkland, Fleming, Green, Martin & Ellis

Gentlemen:

Re: Otto Eisenschiml
vs.
Fawcett Publications, Inc.
Civil Action No. 53 C 1912

I am writing this letter in order to avoid further misunderstanding and confusion.

When the Special Master's Report was prefaced by a notice that the Master had entered a rule upon all parties to file objections, if any, to the Report on or before January 23, 1956, at which time he would take up and hear arguments of counsel upon any objections, I rechecked the rules of civil procedure for the United States District Courts and the rules of our District Court, and I found that these were at variance with the procedure outlined by the Master. I have assumed that the rules are controlling. Accordingly, I have filed objections to the Report and a supporting Brief within the time and at the place prescribed by the rules; and when the defendant's Brief and my reply thereto are filed within the prescribed time, I shall serve notice, as provided by the rules, for the disposition of the objections and the Report by the court, and not by the Master. I am assuming, therefore, that there will be no hearing before the Master on January 23 in connection with objections on the Report, or for any purpose whatsoever. Incidentally, the notice of the Master does not provide a time and place for any such hearing before him.

900 Unless I hear from you, I shall assume that you are in agreement with what I state in this letter.

Respectfully yours,
(signed) Elmer Gertz

901 KIRKLAND, FLEMING, GREEN,
MARTIN & ELLIS
33 North LaSalle Street
Chicago 2

Washington Office
World Center Building

January 12, 1956

Honorable Joseph A. Graber
7012 South Shore Drive
Chicago, Illinois

Dear Judge Graber:

Re: Eisenschiml v. Fawcett Publications

We are in receipt of a letter from Elmer Gertz dated January 10, 1956.

We submit that the letter's disrespectful tone is only surpassed by the curious position counsel has taken therein. We do not believe that the Master's Report contains any errors whatsoever and will make no objection to it. We had, however, presumed upon receipt of the Master's Report, which included a notice of time for arguing objections, that he was acting pursuant to Rule 53 (5) permitting a draft report and had merely transmitted the Report to the Clerk of the Court for service. Manifestly, this procedure would be in accord with the usual Illinois State practice which permits the Master in the first instance to rectify any errors in his Report called to his attention by either party.

To our knowledge, counsel's refusal to appear before the Master and argue the merit of his objections is unprecedented. Normally, a party who is dissatisfied with a Master's Report seeks every opportunity to have his position and objections again heard.

We should also like to point out that even assuming Mr. Gertz be correct and that the filing of the Report terminates the Master's authority, Rule 53 (e) (2) provides that the Court "after hearing may adopt the report or may modify it or reject it in whole or in part or may receive further evidence or may recommit it with instructions." Patently, we believe that even if the Master had lost jurisdiction (which is not the case), if he were to subsequently call the Court's attention to errors in his Report the Court's labor might be materially shortened. Indeed, the Court, if the Master believed there might be inaccuracies in his Report, might very well recommit pursuant to Rule (e) (2) for further hearing.

902 We have read Mr. Gertz' objections and believe that all of them, like the remainder of his case, totally lack merit. We, however, recognize that he is entitled to his day in Court and would be happy to appear at any time the Master chooses to argue the objections. If Mr. Gertz persists in his refusal to argue his objections to the Master, we shall still, if the Master wishes, appear and argue that they are baseless. In the alternative, if the Master wishes, in light of Mr. Gertz' position, to consider plaintiff's objections without argument we have no objection to such a procedure.

Finally, we also note that Mr. Gertz complains about the lack of hour and place for hearing such objections. It is to be remembered that during the hearing and prior to the Master's decision this presented no barrier or problem to any of the parties. The setting of hearings

has always been done informally by telephone and at a time and place convenient to all.

Respectfully submitted,

/s/ J. B. Martineau
J. B. Martineau
/s/ Don H. Reuben
D. H. Reuben

f
Cc: Mr. Elmer Gertz

903 January 20, 1956

Mr. Elmer Gertz
221 North LaSalle St.
Chicago, Illinois
Kirkland, Fleming, Green,
Martin & Ellis
33 North LaSalle St.
Chicago, Illinois

53 C 1912
Otto Eisenschiml
vs.
Fawcett Publications, Inc.
A Delaware Corporation,

Gentlemen:

Pursuant to Rule 53(3)(1) of the Rules of Civil Procedure for District Courts of the United States, you are hereby notified that the Honorable Joseph A. Graber, Special Master, filed his report in the above entitled cause, a copy of which is enclosed.

Yours very truly,

.....
Clerk

....
By Deputy Clerk

904

NOTICE OF FILING OBJECTIONS TO THE SPECIAL MASTER'S FINAL REPORT AND RENEWING OBJECTIONS TO SPECIAL MASTER'S ORIGINAL REPORT

(Filed Jan 24 1956)

Pursuant to Rule 53 of the Rules of Civil Procedure for District Courts of the United States, you are hereby notified that the plaintiff, Otto Eisenschiml, is this day filing with the Clerk of this Court his objections to the "Final Report" of the Special Master (filed with the Clerk of this Court on January 20, 1956, and a copy of which was delivered to plaintiff's attorney on January 23, 1956), a copy of which objections is hereto attached and served upon you.

Please take further notice that the plaintiff incorporates by reference in the said objections his objections to the Special Master's original report and the matters and things filed therewith and his brief in support of his said objections (which brief was filed with the Clerk of this Court on January 9, 1956).

905 Please take further notice that the plaintiff renews his objections to the original report with the same force and effect as if such objections were refiled herewith in addition to having been filed on January 4, 1956.

Please take further notice that plaintiff will file, pursuant to the rules of this Court, his additional brief in support of his objections and will make application to the Court for action upon the reports and objections thereto.

January 24, 1956.

* * *

906

EXCEPTIONS OF PLAINTIFF TO SPECIAL MASTER'S FINAL REPORT
(Filed Jan 24 1956)

Now comes Otto Eisenschiml, the plaintiff in the above entitled cause, by Elmer Gertz, his attorney, and objects to the "final report" of the Honorable Joseph A. Graber, Special Master herein, filed in the Office of the Clerk of this Court on January 20, 1956 (a copy of which reached the plaintiff's attorney on January 23, 1956, at around 11:00 a.m.), in the following particulars, to wit:

1. To the unnumbered first paragraph consisting of the first ten (10) lines on page 2 of the said "final report," in support of which objection there is attached hereto, marked Exhibit "A" and expressly made a part hereof, a true and correct copy of the letter dated January 13, 1956, from Elmer Gertz, as plaintiff's attorney, to the Honorable Joseph A. Graber, Special Master herein, and in further support of which objection plaintiff reserves the right to file a brief in addition to and
907 supplementing the brief heretofore, on January 9, 1956, filed for him with the Clerk of this Court. No response of any kind was made by the Special Master to this letter of January 13, 1956, unless his "final report" is to be construed as an answer.

2. To the First numbered paragraph on page 2 of the said "final report," for the reason that no where in the said paragraph or elsewhere in the reports of the Special Master are there any findings as set forth in Plaintiff's Suggested Findings of Fact, No. (75), heretofore filed with the Special Master and later with the Clerk of this Court and incorporated in the exceptions hereto and to the Master's earlier report by reference with the same force and effect as if set forth herein in full.

3. To the Second numbered paragraph on page 2 of the said "final report" for the reasons set forth on all except the first six lines on page 5 and the first six lines on page 6 of the Plaintiff's Brief filed with the Clerk of this Court on January 9, 1956.

4. To the Third numbered paragraph on pages 2, 3 and 4 of the said "final report" and each and every part thereof, for the reason that the Master's descriptions of the exhibits mentioned in the said paragraph are incomplete and inaccurate in each instance as is shown by an examination of each such exhibit and the evidence in connection therewith, and indicates that the Master misconstrued and misunderstood each such exhibit, and the Master admits in said finding that he had not seen all of the exhibits themselves when preparing his original report and that the present finding is only an after-
908 thought and not based upon an objective and fair analysis of all of the said exhibits, all as more fully argued in Plaintiff's Brief, heretofore filed herein, and in the additional brief to be filed by the plaintiff herein.

5. To the Fourth numbered paragraph on page 4 of the said "final report," in support of which objection the plaintiff incorporates herein by reference, with the same force and effect as if set forth herein in full, his exceptions to the original report of the Special Master (which exceptions were filed with the Clerk of this Court on January 4, 1956), his Brief in support of his said exceptions (which Brief was filed with the Clerk of this Court on January 9, 1956), the Plaintiff's Suggested Findings of Fact and Conclusions of Law (which were filed with the Master originally and then, on January 4, 1956, with the Clerk of this Court), the Plaintiff's Exhibits which were filed with the Clerk of this Court on January 4, 1956, and the entire record herein. In further support of this objection and of all of the Plaintiff's objections to the original and

final reports of the Special Master, the plaintiff reserves the right to file an additional brief.

Dated January 24, 1956.

909 EXHIBIT "A"
January 13, 1956
(Filed Jan 24 1956)

Honorable Joseph A. Graber
7012 South Shore Drive
Chicago 49, Illinois

Dear Judge Graber:

Re: Otto Eisenschiml
vs.
Fawcett Publications, Inc.,
a Delaware Corporation
Civil Action No. 53 C 1912

I am in receipt of a letter from Messrs. J. B. Martineau and Dr. D. H. Reuben of Kirkland, Fleming, Green, Martin & Ellis, dated January 12, 1956, purportedly in answer to mine of January 10, 1956.

My letter of January 10, 1956, was not disrespectful in tone; it was intended to clear up what appeared to me to be a confused situation. Let me make it clear at once that I am perfectly willing to appear before the Master or the Court, or anyone else, in order to argue against what I believe to be errors in the Report. I am not refusing to appear anywhere, and counsel is simply putting words in my mouth.

Let me sum up my viewpoint, so that there will be no further misunderstanding, real or assumed.

The Master's Report was not called a draft report. There was nothing to indicate that it was anything except a final report. It was filed with the Clerk of the United

States District Court, as if it were the final report. In sending a copy to me, the Clerk of the Court expressly declared it to be such. He did not say that it was a draft report under Rule 53 (5) permitting a draft report. His letter of December 28, 1955, said:

> "Pursuant to Rule 53 (e) (1) of the Rules of Civil Procedure for District Courts of the United States, you are hereby notified that the Honorable Joseph A. Graber, Special Master in Chancery, filed his Report, a copy of which is attached, on December 28, 1955."

910 That being the case I naturally presumed that we were, and are, bound to follow the usual rules, not of the Illinois State Courts as suggested by defendant's counsel, but of the United States District Court. This I have done; and I expect the defendant's counsel to do likewise, and to file a Brief in response to mine, and then I can file a reply brief. It seems clear to me that any oral argument, whether before the Master of the Court, should follow, and not precede, the filing of all briefs.

Defendant's counsel made a generalized statement that there is no merit to our case. More satisfactory than any generalized statement will be a specific response to our objections and brief.

We are grateful to counsel for saying that we are entitled to our day in court.

In conclusion, let me say again that I am not refusing, or agreeing, to do anything in particular in this matter, except to follow the rules of court and the usual procedure, to the end that the best interests of my client and justice will be served.

May I hear from you at your earliest convenience on this matter?

Respectfully submitted,

Elmer Gertz

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MEMORANDUM
(Filed Apr 26 1956)

This is an action for alleged infringment by defendant of plaintiff's copyright of two books, called "Why Was Lincoln Murdered" and "In the Shadow of Lincoln's Death". A reference was made to a Special Master, who heard the evidence (compiling a record of 2550 pages), examined the exhibits, ruled on numerous objections, and submitted two reports embodying detailed findings of fact. The case is now before the Court on plaintiff's exceptions to those reports.

Plaintiff's two books are published in hard-cover from, are in length over 500 and 400 pages respectively, and in tone serious historical studies lavishly footnoted. The allegedly infringing piece is a story or article by Joseph Millard, a free lance author, which was published by defendant in "True Magazine". It is called "America's Greatest Unsolved Murder", is in length about 20,000 words, and is written in a style appropriate to a magazine with a wide circulation. All three works are concerned with a detailed study of the assassination of Abraham Lincoln. All three, by emphasizing many esoteric and significant events which preceded and followed the assassination, lead the reader to the conclusion that various prominent persons of the period, notably Secretary of War Stanton, had at least some form of guilty knowledge of the conspiracy, Eisenschiml is an acknowledged
913 authority in the field of Civil War history, and the narrower field of the assassination in particular. He spent many years and an enormous amount of energy and work in the preparation of the books here in suit. Millard testified that in addition to research he had previously done in connection with other articles about the same

historical period, he did about three months' intensive work in preparation for and writing this article. Since he was writing what he hoped would be an entertaining tale rather than a learned treatise, he told his story without direct citation of authority. Therefore, in preparation for his testimony in this case, it was necessary for him to reconstruct the composition of the article from the notes and authorities which he had used. This must have been a tremendous job, which he executed conscientiously. The list of references which he consulted is set out in the record and in the Master's Findings of Fact, and is an impressive one.

As proof of infringment, plaintiff relies heavily on various excerpts from his two books and from Millard's article, which he insists are so nearly identical as to prove copying by Millard. Plaintiff's expert, Donald W. Riddle, read into the record what he described as "85 instances of parallelism", of which he said 13 showed "identity of language of from 13 to 33 words". So far as those involving identical language is concerned, each is a direct quotation by the authors from another source. Illustratively, Booth is supposed to have shouted to a fellow conspirator, "I am pretty certain that we have assassinated the President and Secretary Seward". Dr. Riddle cited the thirteen quoted words as identical—which of course they are, and could hardly escape being so. This quotation is given 914 in both Pittman, "The Assassination of President Lincoln" (page 86), and Poore, "Conspiracy Trial for the Murder of the President" (page 119), as well as other sources used by Millard. The same is true of most of the quotations cited by Dr. Riddle. In a few instances, Millard appears to have relied on plaintiff for a quotation from a third person. For example, Eisenschiml set forth a facsimile of a letter from Mrs. Lincoln recommending the appointment of the guard Parker to the President's

staff. This letter was in Eisenschiml's possession, and Millard could not have referred to it directly. This is of course unimportant. The plaintiff can hardly hope to copyright Mrs. Lincoln's choice of language (17 U.S.C.A. sec. 8; Du Puy *v.* Post Telegram, 210 Fed. 883, 884 (1914). In any event, as the Master has quite correctly found, this type of use of plaintiff's work by Millard is insignificant. Certainly it lends no support to a charge of copying substantial portions of the copyrighted books (Matthews Conveyor Co. *v.* Palmer-Bee Co., 135 F. 2d 83, 85 (C. A. 6, 1943)).

The seventy-two "instances of parallelism" cited by Dr. Riddle which do not involve identity of language are equally unimpressive. They are all descriptions of historical events; a few examples will suffice to indicate their nature. Thus both authors state that the news of Lincoln's death was circulated in New England twelve hours before it actually occurred. Eisenschiml cites as his authority for this item "Fifty Years in the Church of Rome" by C. Ciniqui; Millard testified that he used this source as well as "Assassination and History of the Conspiracy" (1865). A use of the same authorities also explains the references of both authors to Mrs. Lincoln. Eisenschiml and Millard both explain the Grants' refusal to attend Ford's Theater with the Lincolns by showing that 915 Mrs. Grant had previously been exposed to embarrassment by public demonstrations of Mrs. Lincoln's jealousy. Since the theater had advertised that the Grants would be present that night, their absence had long been regarded as something of a mystery, and many historians, in seeking to vindicate the Grants, have used the same explanation. Eisenschiml's account bears a close resemblance to that of Adam Badeau in "Grant in Peace", which he cites. Millard testified that his comment "Twice the sensi-

tive Julia Grant had been publicly humiliated by Mrs. Lincoln's shrieking jealousy", was based on Badeau and on "Meet General Grant" by Woodward. Certainly there is no reason to disbelieve him. The same sort of analysis disposes of most of the other instances of "parallelism". Thus the Masters findings that Millard did not copy from the plaintiff, but used independent sources of research, and that any resemblance between his work and plaintiff's is explained by the use of common sources, are supported by the record. Not only Millard's sworn word, but all the circumstances, indicate clearly that he did not copy from plaintiff. No one can copyright the facts of history, and Millard was at liberty to seek them in the same sources used by plaintiff. (Oxford Book Co. *v.* College Entrance Book Co., 98 F. 2d 688, 681 (C.C.A. 2, 1938); Funkhouser *v.* Loew's Inc., 208 F. 2d 185, 190 (C.A. 8, 1953); Fred Fisher, Inc., *v.* Dillingham, 298 Fed. 145, 151 (S.D.N.Y., 1924).

In short, plaintiff's case so far as it depends on "parallelism" is unconvincing. (Bachman *v.* Belasco, 224 Fed. 817, 818 (C.C.A. 2, 1915); Christie *v.* Harris, 47 F. Supp. 39, 40 (D.C., N.Y., 1942) (aff. 154 F. 2d 827). There remains for consideration his additional theory that his copyright is violated by Millard's agreement with or adoption of inferences drawn by him from his research. In many of the instances of agreement, it is apparent that the two authors reached the same conclusion from 916 an examination on the relevant historical facts. Such an identity of opinion is of course no more subject to stricture, or a violation of the copyright laws, than the parallelism of fact statements discussed above. There are, however, a very few instances in which Millard did not do his own research, but adopted the plaintiff's historical theories. Thus Eisenschiml asserted in "In the Shadow of Lincoln's Death" that no one had ever re-

corded the exact time when Lincoln was shot, but that the event actually occurred at 10:13 P.M. He arrived at this deduction by a chain of reasoning from various clues taken from the testimony of one of the witnesses at the Surratt trial. The information the Lincoln was shot at 10:13 P.M. is stated as a historical fact; and if that is what it is, it is beyond the reach of copyright (Oxford Book Co., supra). If, however, the same statement be accepted as plaintiff's original guess as to when the event probably occurred, it still may not be monopolized by him. (Moore *v.* Ford Motor Co., 28 F. 2d 529, 539 (D.C., S.D. N.Y., 1928). Ideas and theories, however original, and whatever the time and labor required to produce them, are not subject to copyright (Crume *v.* Pacific Mutual Life Ins. Co., 140 F. 2d 182, 183 (C.A. 7, 1944); Baker *v.* Selden, 101 U.S. 99, 103 (1879). An idea, speculation or opinion is published so that it may add to and advance the total knowledge in a particular field. The purpose of communicating it in this way is to persuade others to agree with it, or to expose it to criticism so that its accuracy may be tested. This purpose could not be served were it subject to copyright. Eisenschiml himself appears to
917 have subscribed to this belief and to have published his books with this purpose. He wrote to Millard: "Since my two books came out I have been hoping against hope that someone else may take up where I left off and find additional material, either in confirmation or in refutation. * * * What we want is the truth, and I don't care much whether I am shown to be right or wrong".

In summary, plaintiff has failed to prove his case. Infringment of a copyright is a tort, and the plaintiff, to be successful, must prove a substantial copying. (Oxford Book Co. supra, at 692; Frankel *v.* Irwin, 34 F. 2d 142, 143 (D.C., S.D.N.Y., 1918). Not only are the Master's findings here not "clearly erroneous" (Federal Rule of Civil

Procedure 53 (e) (2)), they are, on the contrary, clearly correct and fully supported by the evidence.

Plaintiff has urged various objections to the procedure before the Master. His animadversion on the subject is unwarranted. An examination of the record makes it clear that the numerous hearings were conducted by the Master with complete propriety and imartiality, and that all the evidence had his conscientious attention.

The Master has further found that plaintiff's case is without merit and that under Title 17 U.S.C. sec. 116, defendant is entitled to recover reasonable attorney's fees as well as costs of the suit. This finding is also correct.

The Masters reports are accordingly confirmed in full. A re-reference will be made to the Master to determine the amount of attorney's fees.

/s/ Philip L. Sullivan
Philip L. Sullivan, Judge

April 26th 1956

918

This cause coming on for ruling on objections to Master's Reports come the parties by their counsel, said reports are confirmed in full and re-reference will be made to the Master to determine the amount of attorney's fees. The Court files its Memorandum Opinion and it is

Ordered that the defendant shall submit draft order on April 30, 1956 at 10:00 A. M.

919

ORDER

(Filed April 30, 1956)

This cause having come on to be heard by the Court upon the complaint of Otto Eisenschiml, answer to Fawcett Publications, Inc., a Delaware corporation, filed thereto, the report and supplemental report of Joseph A. Graber, Special Master of this court, to whom this cause

was referred, the transcript of the testimony taken before such Special Master, the exhibits introduced in the hearing before such Special Master, and upon the objections filed by the plaintiff to the reports of the Special Master, and the Court having examined the pleadings, the evidence, the exhibits, the Special Master's reports and the objections thereto, and having heard the arguments of counsel for the respective parties, and the Court being fully advised in the premises finds:

920 1. That the Court has jurisdiction of the parties hereto and the subject-matter hereof.

2. That the Special Master did proceed in all respects in accordance with the law and the order of reference herein.

3. That the Special Master's report and supplemental report should be sustained, confirmed, adopted and approved, that the objections to said reports should be overruled, and that the fees of the Special Master amounting to $7500.00 as set forth in his report are proper and reasonable and should be taxed as costs against the plaintiff herein.

4. That the article written by Joseph Millard and published in the February 1953 issue of True Magazine by the defendant under the title of "America's Greatest Unsolved Murder" did not in any way infringe upon or copy any copyrighted material contained in the plaintiff's two separate works, "Why Was Lincoln Murdered" and "In the Shadow of Lincoln's Death," and said work of Joseph Millard is an independent literary creation based upon independent research.

5. That whatever use Joseph Millard may have made of Otto Eisenschiml's works is non-actionable because it was an insignificant use, a fair use, or use of non-copyrightable material.

6. That the defendant incurred no liability whatsoever to the plaintiff as a result of its publishing the said
921 article entitled "America's Greatest Unsolved Murder," in its February 1953 issue of True Magazine.

7. That during the time that this cause was being heard by the Special Master, each of the parties hereto deposited with the Special Master as a security for his reasonable fees the sum of $1500.00 and the defendant is entitled to recover judgment against the plaintiff for its portion of said deposit, being the sum of $1500.00.

8. That the equities in this cause are with the defendant and against the plaintiff and plaintiff's complaint and each count thereof should be dismissed for want of equity.

9. That plaintiff's case lacks any merit whatsoever and thus the defendant is entitled, pursuant to the statute in such case made and provided, to recover a reasonable attorney's fee from the plaintiff as well as all proper costs of this suit.

It Is Hereby Ordered:

1. That the objections filed to the report of Joseph A. Graber, Special Master of this Court to whom this cause was referred, be and the same are hereby overruled and said report and supplemental report of said Special Master be and the same are hereby sustained, confirmed, adopted and approved in all respects.

2. That the plaintiff, Otto Eisenschiml, be and he is hereby ordered to pay to the defendant, Fawcett Pub-
922 lications, Inc., as and for reimbursement to said defendant the sum of $1500.00, which sum the defendant has deposited with the Special Master as hereinabove set forth.

3. That the plaintiff, Otto Eisenschiml, be and he is hereby ordered to pay to the Special Master, Joseph A. Graber, the additional sum of $4500.00 for and on behalf of said Special Master's unpaid fee.

4. That the written opinion of this Court filed in this cause on April 26, 1956, be and the same is hereby incorporated in this order with the same force and effect as if the same were specifically set forth herein.

5. That this cause be and the same is hereby re-referred to the said Special Master, Joseph A Graber, with directions to take and hear evidence as to the amount of attorney's fees reasonably expended by the defendant in defense of this suit and to report the same back to this Court, togeteher with his conclusions of fact and law.

6. That jurjsdiction of this cause be and the same is hereby retained by this Court for the purpose of entering final judgment dismissing plaintiff's complaint for want of equity, awarding judgment to the defendant for defendant's reasonable attorney's fees and all of its costs
923 herein expended, and for assessing any Master's fees that might subsequently be incurred.

Enter

/s/ Philip L. Sullivan
Philip L. Sullivan, Judge

Dated: April 30, 1956

924

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Otto Eisenschiml,
Plaintiff-Appellant,
vs.
Fawcett Publications, Inc., a Delaware Corporation,
Defendant-Appellee.
No. 53 C 1912

NOTICE OF APPEAL.
(Filed May 22, 1956)

Notice is hereby given that Otto Eisenschiml, plaintiff herein, hereby appeals to the United States Court of

Appeals for the Seventh Circuit from the judgment order against plaintiff entered in this action on April 30, 1956.

Elmer Gertz and Irwin S. Baskes
/s/ By Elmer Gertz
Attorneys for Appellant,
Otto Eisenschiml,
120 S. La Salle Street,
Chicago 3, Illinois,
RAndolph 6-6116.

925

United States of America, }
Northern District of Illinois }

• • (Caption—No. 53 C 1912) • •

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on the 22nd day of May, 1956, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Howard Ellis, J. B. Martineau, Don H. Reuben
Kirkland, Fleming, Green, Martin and Ellis
Prudential Plaza, Chicago 1, Illinois

Joseph A. Graber
7012 South Shore Drive
Chicago 49, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 22nd day of May, 1956.

Roy H. Johnson
Clerk

By Gizella Butcher
Deputy Clerk

(Seal)

926-929 • • •

930

APPELLANT'S STATEMENT OF POINTS.
(Filed May 29 1956)

Appellant, Otto Eisenschiml, plaintiff in the above entitled cause, intends to rely on the following points:

1) The Special Master and Court erred in improperly admitting certain of defendant's exhibits in evidence and in not permitting certain of plaintiff's exhibits to be admitted in evidence.

2) The Special Master and Court erred in not examining or considering various exhibits that were received in evidence, and in not making findings in connection therewith.

3) The Special Master and Court erred in not considering, and in not making findings with respect to, certain admissions of the defendant and its witnesses.

4) The Special Master and Court erred in not considering, and in not making findings with respect to and, certain uncontradicted and unimpeached testimony of witnesses.

5) In making their findings of fact and conclusions of law the Special Master and Court:

a) Erred in finding that the special Master did
931 proceed in all respects in accordance with the law.

b) Erred in finding that the Special Master's report and supplemental report should be sustained, confirmed, adopted and approved, and that the objections to said reports should be overruled.

c) Erred in finding that the fees of the Special Master are proper and reasonable and should be taxed as costs to the plaintiff herein.

d) Erred in finding the article written by Joseph Millard and published in the February 1953 issue of True Magazine by the defendant under the title

of "America's Greatest Unsolved Murder" did not in any way infringe upon or copy any copyrighted material contained in the plaintiff's two separate works, "Why Was Lincoln Murdered" and "In the Shadow of Lincoln's Death," and that said work of Joseph Millard is an independent literary creation based upon independent research.

e) Erred in finding that whatever use Joseph Millard may have made of Otto Eisenschiml's works is non-actionable because it was an insignificant use, a fair use, or use of noncopyrightable material.

f) Erred in finding that the defendant incurred no liability whatsoever to the plaintiff as a result of its publishing the said article entitled "America's Greatest Unsolved Murder", in its February 1953 issue of True Magazine.

932 g) Erred in finding that the equities in this cause are with the defendant and against the plaintiff and that plaintiff's complaint and each count thereof should be dismissed for want of equity.

h) Erred in finding that plaintiff's case lacks any merit whatsoever and that the defendant is entitled to recover a reasonable attorney's fee from the plaintiff as well as all proper costs of this suit.

6) The Special Master and Court erred in making their conclusions of law.

7) The Court erred in refusing to enter summary judgment in favor of the plaintiff.

8) The Special Master and Court erred in not having made the findings of fact set forth in plaintiff's Suggested Findings of Fact, and particularly those enumerated in plaintiff's objection No. 15 to the Special Master's Report.

9) The Court erred in not having taxed costs and fees, as well as damages and profits, against the defendant.

10) The Special Master and Court erred in not finding that defendant appropriated plaintiff's research.

11) The Special Master and Court erred in not finding that defendant copied the language, substance, concepts, arrangement, style, treatment and essence of plaintiff's said two books.

933-941 • • •

942

This cause coming on for hearing on the plaintiff's motion to stay proceedings pending appeal come the parties by their counsel and upon due consideration the Court being fully advised it is

Ordered that the proceedings be stayed upon filing of supersedeas bond by the plaintiff.

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This day comes the plaintiff by its counsel and presents for approval his Supersedeas Bond in the amount of Seven Thousand Dollars ($7,000.00) and it appearing to the Court that said bond is properly conditioned and that the sureties are good and sufficient security for said amount it is

Ordered that said bond be and the same hereby is approved and ordered to be filed with the Clerk of this Court.

944-947 • • •

948

PETITION
(Filed Jun 28 1956)

Now comes Joseph A. Graber, duly appointed Special Master in Chancery herein by the Honorable Judges of the United States District Court for the Northern Dis-

trict of Illinois, Eastern Division, by his attorney, Eugene J. Graber, and represents unto this Court as follows:

1. That on the 30th day of April, 1956, this Court entered an order approving and sustaining the Special Master's Reports heretofore filed herein and approving Special Master's fees of $7,500. Said order assessed the Special Master's fees against the plaintiff, the unsuccessful party herein. The plaintiff and defendant having previously deposited with the Special Master the sum of $1,500.00 each, the said order provided that the plaintiff should pay to the Special Master an additional sum of $4,500.00 which when added to the $3,000.00 deposit of the parties would be full payment for the Special Master's fees allowed by this Court.

2. That the Special Master as more fully appears from his Reports filed herein had asked this Court to approve Master's fees in the sum of $6,000.00. The Special Master did not discover this discrepancy between the amount
949 requested for Master's fees and the amount allowed until shortly before the filing of this petition.

3. That prior to the Special Master's discovering the said discrepancy the plaintiff herein filed Notice of Appeal to the Court of Appeals for the Seventh Circuit and therefore this Court is presently unable to modify its order of April 30, 1956, having lost jurisdiction to do so at the time of the filing of said Notice of Appeal.

4. That the Special Master desires to have the discrepancy between the amount he has requested for fees and the amount allowed by the Court eliminated by filing herein a satisfaction setting forth that the plaintiff has paid $1,500 to the Master since the entry of the order of April 30, 1956. The plaintiff herein has not paid to the Special Master any monies whatsoever subsequent to the entry of said order and thus said satisfaction will result in reducing the obligation of plaintiff to the amount of

$3,000.00 which obligation together with the deposits heretofore received by the Special Master aggregate the amount of fees the Special Master requested be approved in his Reports.

5. That subsequent to the filing of said Notice of Appeal the plaintiff posted a surety bond securing the defendant for costs. However, plaintiff has filed no bond securing the Special Master for the payment of his fees due pursuant to the order of April 30, 1956. The Special Master asks the Court to give him judgment against the plaintiff for $3,000.00 and issue execution thereon unless plaintiff files herein a surety bond in favor of the Special Master and for the sum of $3,000.00.

950 Wherefore, the Special Master prays:

1. That this Court enter an order granting him leave to file a satisfaction reciting that $1,500.00 of the $4,500.00 sum ordered to be paid to the Special Master by the plaintiff herein by the order of April 30, 1956, has been paid by plaintiff.

2. That the Special Master be given judgment against the plaintiff for $3,000.00 and that execution of said judgment be stayed only if the plaintiff files herein a surety bond in favor of the Master and for the sum of $3,000.00.

/s/ Joseph A. Graber

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PARTIAL SATISFACTION

(Filed June 28, 1956)

Whereas, by order of this Court entered on the 30th day of April, 1956, the plaintiff, Otto Eisenschiml, was ordered to pay to Joseph A. Graber as Special Master the sum of Seventy-Five Hundred and no/100 ($7500.00) Dollars as and for his Special Master's fees, Joseph A.

Graber, Special Master in the above entitled cause, does hereby acknowledge the sum of Fifteen Hundred and no/100 ($1500.00) Dollars in partial satisfaction of the order entered herein on April 30, 1956, this 28th day of June, A. D. 1956, and the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, is hereby authorized and empowered to enter partial satisfaction of said order of record to the extent of Fifteen Hundred and no/100 ($1500.00) Dollars.

Joseph A. Graber
Special Master
By Eugene J. Graber
Attorney for Special Master

* * *

953-963 * * *

964

ORDER

Pursuant to the Stipulation of the parties, filed herein this day.

It Is Ordered that the Clerk of this Court, in preparing and transmitting the Record on Appeal in this cause in the pending Appeal of the plaintiff, Otto Eisenschiml, to the United States Court of Appeals for the Seventh Circuit, be and is hereby authorized and directed to proceed in accordance with and pursuant to the provisions of Rule 12 of the Rules of the United States Court of Appeals for the Seventh Circuit, effective July 1, 1956.

Enter: Julius Hoffman
Judge

Dated at Chicago, Illinois
this 9th day of July, 1956.

965 United States of America } ss:
Northern District of Illinois }

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: Otto Eisenschiml, Plaintiff *v.* Fawcett Publications, Inc., a Delaware Corporation, Defendant, No. 53 C 1912, as follows:

Complaint, filed September 16, 1953.

Notice and Answer of Defendant, filed November 9, 1953

Order entered December 14, 1953, giving plaintiff leave to file Motion for Summary Judgment

Notice and Plaintiff's Motion For Summary Judgment, with Affidavit of Plaintiff and Exhibits A, B and C attached thereto, filed December 14, 1953 (Plaintiff's Exhibit 7)

Notice and Affidavit of Joseph Millard, filed January 28, 1954

Transcript of Proceedings Had Before The Honorable Philip L. Sullivan, On February 11, 1954, and filed June 20, 1956

Order entered February 11, 1954, referring cause to Special Master James O'Shaughnessy

Transcript of Proceedings Had Before The Honorable Philip L. Sullivan, on February 15, 1954, and filed June 20, 1956

Order entered February 15, 1954, vacating order of reference to Special Master James O'Shaughnessy

Notice and Defendant's Response to Plaintiff's Request For Admissions, filed February 25, 1954 (Plaintiff's Ex. 6-A id)

Notice and Answers To Interrogatories, filed March 1, 1954 (Plaintiff's Ex. 6-B id)

Notice and Defendant's Response To Plaintiff's Request For Admissions, filed March 8, 1954 (Plaintiff's Ex. 9A-id)

Petition of Plaintiff Otto Eisenschiml, filed September 20, 1954

Transcript of Proceedings Had Before The Honorable Philip L. Sullivan, on September 20, 1954, and filed June 20, 1956

966 Order entered September 20, 1954, referring cause to Master in Chancery Joseph A. Graber

Notice and Defendant's Response to Plaintiff's Request for Additional Admissions, filed October 5, 1954 1954

Deposition of Joseph Millard filed October 28, 1954

Deposition of Ralph Daigh, filed October 28, 1954

Stipulation, with Interrogatories Propounded by Plaintiff and Defendant to Mrs. Joseph J. Millard and Cross-Interrogatories Propounded by the Plaintiff, Otto Eisenschiml, to Mrs. Joseph J. Millard (Without Prejudice To Objections To Direct Interrogatories), attached, filed November 22, 1954

Deposition of Mrs. Joseph J. Millard on Written Interrogatories and Cross-Interrogatories, filed December 3, 1954

Oath of Office of Joseph A. Graber, filed March 3, 1955

Notice of Clerk of the District Court of the filing of Special Master's Report, dated December 28, 1955

Special Master's Report and Notice Attached, filed December 28, 1955

Notice of Filing Objections to Special Master's Report, certain exhibits and suggested Findings, Exceptions of Plaintiff to Special Master's Report with Exhibits A and B attached, filed January 4, 1956

Plaintiff's Suggested Findings of Fact, filed January 4, 1956

Special Master's Final Report filed January 20, 1956

Exhibits in this cause filed by Special Master on December 28, 1955, together with Transcript of Proceedings Had Before Special Master, filed December 28, 1955 (transmitted separately for convenience)

Notice of Clerk of the District Court of the filing of Special Master's Report, dated January 20, 1956

Notice of filing Objections to the Special Master's Final Report and Renewing Objections to Special Master's Original Report, Exceptions of Plaintiff to Special Master's Final Report, with Exhibit A attached, filed January 24, 1956

Order entered January 27, 1956, allowing time for filing briefs in support of and opposition to Special Master's Report.

967 Memorandum Decision of the Court, filed April 26, 1956.

Order entered April 26, 1956 confirming Master's Reports

Judgment Order entered April 30, 1956.

Plaintiff's Notice of Appeal filed May 22, 1956 (Clerk's Certificate of Mailing Attached)

Appellant's Designation of Contents Of Record On Appeal, filed May 29, 1956

Appellant's Statement of Points, filed May 29, 1956

Notice and Appellee's Designation of Additional Portions of Record On Appeal filed June 5, 1956

Plaintiff's Notice of Motion and Motion to Stay Proceedings, filed June 4, 1956

Order entered June 4, 1956 staying proceedings upon filing of Supersedeas Bond by the Plaintiff

Order entered June 5, 1956 approving Supersedeas Bond in the amount of $7,000.00 (Bond filed but not transmitted herewith)

Stipulation for extension of time for filing of record on appeal filed June 27, 1956

Order on Stipulation extending time for filing record on appeal to July 31, 1956, entered June 27, 1956

Notice of Motion and Petition of Special Master Joseph A. Graber, filed June 28, 1956

Order entered June 28, 1956 allowing Special Master to file a partial satisfaction in the sum of $1,500.00

Partial Satisfaction of Special Master Joseph A. Graber, filed June 28, 1956

Transcript of Proceedings had Before The Honorable Philip L. Sullivan, On June 28, 1956, and filed July 17, 1956

Appearance of A. L. Hodson as additional counsel for defendant, filed July 2, 1956

Stipulation filed July 9, 1956

Order entered July 9, 1956 pursuant to stipulation authorizing Clerk of the District Court to prepare and transmit record on appeal pursuant to the provisions of Rule 12 of the Rules of the United States Court of Appeals, for the Seventh Circuit, effective July 1, 1956

filed and entered among the records of the said Court in my office on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 30th day of July, 1956.

Roy H. Johnson
Clerk

(Seal)

In the

United States Court of Appeals

For the Seventh Circuit

No. 11830

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54 IN THE UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

Otto Eisenschiml, *Plaintiff*,
vs.
Fawcett Publication, Inc., a Delaware corporation, *Defendant*.
No. 53 C 1912.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Philip L. Sullivan, one of the Judges of said Court, in his court room in the United States Court House, at Chicago, Illinois, on February 11, 1954.

Appearances:

Mr. Elmer Gertz, Appeared on behalf of the Plaintiff;

Mr. J. B. Martineau and Mr. Don H. Reuben, Appeared on behalf of the Defendant.

55 The Clerk: 53 C 1912. Otto Eisenschiml *vs.* Fawcett Publication, Inc. Pre-trial conference.

The Court: Our reason I called you, Mr. Gertz thought it might be well and desirable that the Court should have a conference with counsel with respect to this case. Do you have anything in mind?

Mr. Gertz: I will tell you frankly what I have in mind. I suppose anybody who is an advocate, being convinced of the justice of his case being so clear, wonders at the obtuseness of the other side. This seems to me so clearly

a case of infringement as contrasted to damages, and I thought a lot would be gained if we sat down and reviewed the matter in general, so your Honor and the parties would know exactly what is involved and what the stature of the case is.

Mr. Martineau: We cannot quite agree on the infringement. We think this is a clear case of no infringement, because the matter involved is in the public domain. On this motion for a summary judgment, you recall, we have an affidavit by the man that wrote the story in True Magazine, whom we represent, Joseph Millard, in which he
56 denies under oath that the plaintiff's work is original, because it is a matter of historical fact. He stated he did his own research. That is a question of fact.

The Court: Well, now, I presume you gentlemen are familiar with how our court of appeals here anyway feels about summary judgments. I think only about one-half of one per cent ever stand up. If there is any issue of fact at all, they say, "Well, give them their day in court."

Now, I don't know how a summary judgment could be entered here for this reason. He says, that is Millard, and he is the defendant, that he did not copy any of your book. Now, he is entitled to prove that, isn't he?

Mr. Gertz: Yes, your Honor, except this, that is a generalization. I have 116 specific instances—not just one of them. Some of them are in the identical language or almost identical language.

The Court: I know, but suppose this happened—I am not deciding your case at all, I haven't any opinion—but suppose that he got his information from the same people you did, notwithstanding the fact it was in the book. Then what?

Mr. Gertz: He, himself, in what I set forth in our
57 affidavit, admitted the originality of the plaintiff's book and its sensational discoveries.

Mr. Martineau: We deny it.

Mr. Gertz: Paragraph 11. That is a direct quotation from their own publication, by their own writer. Suppose what we have in our affidavit is before the Court, and there was no counter-vailing testimony; obviously, we would have established our case. It seems to me that on the basis of what the record now is, and the right the Court has in these pre-trial conferences to indicate how the parties should proceed, and where they don't have to offer evidence, obviously the burden is on the defendant to present a defense. We have set forth what would be a very good case.

The Court: Now, getting right back to the same statement I made originally, if that be true—if they say they did not pick anything from your book, they are entitled to prove that, aren't they?

Mr. Gertz: Yes.

The Court: Isn't that right?

Mr. Gertz: If that is the equivalent of saying that in none of these exhibits the language is identical or similar, that is a matter of defense.

58 The Court: Yes, I know, it is a matter of defense.

Mr. Martineau: No, it is not identical language.

The Court: They are entitled to put in a defense to it, if he claims that his client went to all these different places and received the material that you have in that book. Suppose that the defendant says—I think the affidavit shows he claims he put in five and a half months, something like that, in research.

Mr. Martineau: That is right.

The Court: Suppose he got it from the same people you did.

Mr. Gertz: I am not talking about the language of the sources. The language of the author was copied.

Mr. Martineau: If that is so, we are prepared to show that both of them got it from the same source, and the language there was practically identical. These are all historical facts.

Mr. Gertz: How are they able to overcome their admission before there was even a suit?

Mr. Martineau: Show me an admission.

Mr. Gertz: Paragraph 11 of my affidavit. Quoting from prior publication of the defendant. It appeared in the
59 same magazine, the article was by the same author who wrote the infringing article here. Here is what he wrote. This is a direct quotation. I also have in addition for the Court photostats of the book.

"To recount only the known facts about the assassination would fill volumes—and leave most of the important questions unanswered. Mr. Otto Eisenschiml of Chicago, the outstanding authority on Abraham Lincoln's death, has devoted a lifetime of intensive research on the subject. His two books 'Why Was Lincoln Murdered?' and 'The Shadow of Lincoln's Death' are packed with his own sensational discoveries * * *."

The Court: That is in the affidavit?

Mr. Gertz: Yes.

The Court: It was his own discovery?

Mr. Gertz: Yes.

The Court: If they can, aren't they permitted to refute it?

Mr. Gertz: Their own statement. Can they contradict their own statement?

Mr. Martineau: Is that an admission of infringe-
60 ment?

By Mr. Gertz: I am quoting from a statement made by the defendant's own author in the defendant's own publication, where they state that my client in his two books "The result of a lifetime of intensive research"—

and that these two books "are packed with his own sensational discoveries." They admit that, and they set forth some of them.

Now, they say it is not original. They, themselves, before there was ever a suit in prospect, admitted these two books were generally packed with plaintiff's own sensational discoveries. And those are the very things they proceed to take. And now they say those are not original, the very words underlined. When there was no suit or thought of infringement, they admitted it. That is why I say, if your Honor is disinclined to grant summary judgment, there is no jury involved here, the Court can proceed in a sensible manner.

The Court: I am trying to proceed in a sensible manner.

Mr. Gertz: That is why I say, on the basis of these affidavits, which are not matters really of conjecture,
61 quoting for example passages of the book, and in the light of their admission, they ought to proceed with their defense.

Mr. Martineau: What is there to justify your insisting that the burden of proof is on the defendants?

Mr. Gertz: In a pre-trial conference, the Court can make an appraisal to find out whether a fact is in dispute or not, and can say to the parties: "These things are established, and these are not."

Mr. Martineau: They are all matters of historical fact. Assume that Dr. Eisenschiml is a great authority on the subject of the assassination of Abraham Lincoln, but what he discovered and gave to the world are all matters of historical fact, and we are prepared to show it.

If you will, look at one of these alleged sentences that he says are alike, and you will see both come from a common source and the language is practically identical from the original source. Mr. Eisenschiml gets it, and we get it. If we were going to copy this man's work, why would

he spend five and a half months and thousands of dollars in research, as Mr. Millard swore he did? It is perfectly absurd!

The Court: As I said before, with respect to
62 taking summary judgment, in this circuit particularly, there isn't one-half of one per cent of them that stand up. I think in this case, assuming I would enter a summary judgment, it would just be a waste of time and money, because they would send it back.

Mr. Gertz: What about the suggestion I make with respect to the defendant proceeding to establish a defense?

The Court: I can't very well do that until I hear what you have to say about this. Then I assume they will try to offer some defense.

Mr. Martineau: Certainly. We are prepared to do it, but we would like to proceed in the usual, orderly manner.

Mr. Gertz: Is it possible to get a very early trial?

The Court: Has this case been reached?

The Clerk: No, it has not been reached.

Mr. Gertz: One of the difficulties here is that the author of the article is in Colorado. If he were available here, we would be able to take his deposition.

Mr. Martineau: We intend to get his deposition. We will give you that pleasure, sir.

63 Mr. Gertz: Could you produce him up here?

Mr. Martineau: We have no control over him. He is an independent contractor. What is there in this to make us produce a man from whom we bought a bit of merchandise?

The Court: Your case has not been reached. What I can do, and probably what should be done, is to have it go to a master, and you could get started at once. What do you say about that?

Mr. Gertz: I would like to. I suppose the matter of costs will abide the decision of your Honor?

The Court: I suppose so.

Mr. Gertz: I would like to have an opportunity of being able to proceed immediately.

The Court: Then that will have to go to a master, if you proceed immediately.

Mr. Martineau: Whatever your Honor decides is all right with us. We did want to get the deposition of Mr. Millard in Florida.

The Court: Is that all right with you? I will make a reference.

Mr. Gertz: Yes, that is all right.

Mr. Martineau: Yes.

The Court: First of all, there is a motion for a summary judgment. That will be denied, and you can
64 raise your point in the trial, of course.

Mr. Gertz: Your Honor, may I suggest perhaps that it be continued rather than denied?

The Court: I can't do that very well, continue it. I have either got to grant it or deny it.

Mr. Gertz: I don't know if there is any reason to appeal from your denial. I doubt it very much. But I don't want to put myself in the position I have to appeal. I don't want to appeal more than once.

The Court: No, there would not be any, anyway, any appeal from an order denying summary judgment. If it was the other way, if I gave judgment for summary judgment, the other side could appeal. Just a minute. I will see who I will refer that to as special master.

I am not 100 per cent impressed with professors, but I am going to refer this to a professor, and also a good lawyer. He has been in here several times when he was with the North Western, James O'Shaughnessy, 10 South LaSalle Street.

Mr. Gertz: Do we have to draw a formal order?

The Court: No. Enter it by agreement. I will refer it.

65 Mr. Martineau: Mr. Reuben, my associate, tells me he is against Professor O'Shaughnessy in the rather hotly contested case.

Mr. Reuben: It is a blue sky suit, in which there are 150 people represented by Mr. O'Shaughnessy, and we represent the only defendant with any money.

The Court: If you think that would be objectionable, I will appoint someone else.

Mr. Gertz: I have no opinion in the matter.

Mr. Martineau: It is just that we have this case for our New York counsel. I am sure it would be all right with us, but I would hate to be criticized later.

The Court: Very well. I will tell you, I will make the appointment, and you can talk to O'Shaughnessy when you go over; and if you think he would be prejudiced in any way, you can come back, and I will vacate it. He is in Room 1248, and his telephone is Central 6-2780. All right.

Mr. Martineau: Motion for summary judgment is denied?

The Court: Yes.

Mr. Gertz: Do you agree with me that there are many things that perhaps can be admitted in order to simplify proceedings?

The Court: Why don't you gentlemen sit down and
66 see if you can agree?

Mr. Gertz: I don't suppose either of us wants to pile up a record on this.

The Court: Yes, that is right.

Mr. Martineau: Thank you very much.

70 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—53-C-1912) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Philip L. Sullivan, one of the Judges of said Court, in his court room in the United States Court House, at Chicago, Illinois, on February 15, 1954.

Appearances:

Mr. Don H. Reuben, appeared on behalf of the Defendant.

71 The Clerk: 53 C 1912. Otto Eisenschiml *vs.* Fawcett Publication, Inc. Motion to vacate order referring this cause to Master O'Shaughnessy.

Mr. Reuben: Your Honor will remember we were here last Thursday. Since that time, although we have the highest regard for Master O'Shaughnessy, neither ourselves nor the defendant can accept him as a master, because he is in another lawsuit with our office. This morning the plaintiff's attorneys called us and said they could not be here, and would like to have the order vacated, and they would come in on new notice. They were not sure now whether they would like a master, and wanted to see whether they properly brought the motion for referral before the Court, in view of the requirements of Rule 53(b). Under Rule 53(b) of the Federal Rules they have to make a special showing. So at this time they want the order vacated with no referral at all.

The Court: Did you notify the master?

Mr. Reuben: Yes, we served notice on the master and on the plaintiff.

The Court: All right.

73 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—53-C-1912) * *

At Chicago, Illinois, in said Division and District on February 15, 1954, Present: Honorable Philip L. Sullivan, District Judge:

On motion of the defendant by its counsel it is

Ordered that the order heretofore entered herein referring this cause to the Master in Chancery James B. O'Shaughnessy be and the same hereby is vacated.

90 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—53-C-1912) * *

PETITION.

Petitioner, Otto Eisenschiml, plaintiff herein, by Elmer Gertz, his attorney, respectfully represents unto this Honorable Court as follows:

1. This is an equity case, not involving a jury, in which he claims that defendant infringed his copyrights in two books. The case is at issue and should be speeded toward a trial within a reasonable time.

2. This court heretofore entered an order by agreement referring the cause to a Master in Chancery for hearing, but the order of reference was vacated because defendant believed there were circumstances barring the particular master from hearing the matter.

3. Petitioner believes that extraordinary reasons exist as to why the cause should now be referred to another master for trial in the best interests of the parties hereto, the witnesses and the court, because the issues are involved, the testimony is likely to be voluminous and there are accounting features to the case.

4. The parties took depositions of certain witnesses recently in New York, such depositions involving three days of testimony and much documentary material. The parties have also had other pre-trial discovery in the form of admissions, interrogatories and examination of documents.

91 5. Plaintiff was seventy-four (74) years old at his last birthday in June, 1954, and is desirous that the cause be tried while he is still of sound mind and memory and in good health. He believes that it will be of less physical strain to him to have the cause tried before a Master in Chancery than in open court.

Wherefore, plaintiff prays for the entry of an order referring this cause to a Master in Chancery for hearing and for such other and further relief in equity as shall be meet.

/s/ Otto Eisenschiml,
Otto Eisenschiml,
Petitioner, Plaintiff herein.

State of Illinois, }
County of Cook. } ss.

Otto Eisenschiml, being first duly sworn, on oath deposes and says that he has read the above petition by him subscribed and that the same is true in substance and in fact.

/s/ Otto Eisenschiml,
Otto Eisenschiml.

Subscribed and Sworn to Before Me this 8th day of September, 1954.

Gertrud E. Wadenpohl,
(Seal) *Notary Public.*

My Commission Expires April 19, 1955.

93 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—53-C-1912) * *

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Philip L. Sullivan, one of the Judges of said Court, in his court room in the United States Court House, at Chicago, Illinois, on September 20, 1954.

Appearances:

Mr. Elmer Gertz appeared on behalf of the Plaintiff;

Mr. Don H. Reuben appeared on behalf of the Defendant.

94 The Clerk: 53 C 1912. Otto Eisenschiml *vs.* Fawcett Publication, Inc. Motion to refer to Master in Chancery.

Mr. Gertz: Your Honor, some weeks ago this cause was referred by agreement to a Master in Chancery. Then the order was vacated solely because counsel felt the particular master would be unable to judge the matter fairly. I now feel it ought to be referred to a Master in Chancery, so we can proceed. The case has been at issue for some while, and depositions have been taken, and pre-trial discovery had. My client happens to be a rather aged man, although youthful in appearance. I feel in fairness to him and the Court, and particularly because of the accounting feature that may be involved, the case ought to go to a Master in Chancery.

Mr. Reuben: It seems to us it would be duplicating a copyright infringement case. Ultimately the Court is going to have to read the two books involved, and that is the genesis of the case. Surely, if there were an account-

ing feature later, if we were found guilty of infringement, it would be a matter for the master.

The Court: Isn't that true of any complicated case, the Judge has to decide it eventually?

95 Mr. Reuben: That is true.

The Court: Heretofore you had no objection to it.

Mr. Reuben: I think we did object to it.

The Court: No, there was no objection to it the last time it was here. I am going to refer the case to Master Joseph A. Graber.

97 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—53-C-1912) * *

At Chicago, Illinois, in said Division and District on September 20, 1954, Present: Honorable Philip L. Sullivan, District Judge.

On motion of the plaintiff by his counsel it is

Ordered that this cause be and the same hereby is referred to Master in Chancery Joseph A. Graber, Esquire.

106 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Otto Eisenschiml,
Plaintiff,
against
Fawcett Publication, Inc., a Delaware Corporation,
Defendant.

Equitable Relief Sought
Civil Action
No. 53 C 912

Room 1408, 420 Lexington Avenue,
New York City, New York,
March 25, 1954, 2 o'clock P.M.

Appearances:

Elmer Gertz, Esq. (of Chicago, Illinois), Attorney for Plaintiff, Otto Eisenschiml,

De Witt, Van Aken & Nast, Esqs. (420 Lexington Avenue, New York, N. Y.), Attorneys for Defendant, By: J. B. Martineau, Esq. (of Chicago), William E. Flannery, Esq., of New York, of counsel.

Also Present: Dr. Otto Eisenschiml, the Plaintiff.

107 Deposition of Joseph Millard, of 2462 Belvoir Boulevard, Sarasota, Florida, a witness of lawful age, taken on behalf of the Defendant, in the above-entitled cause, wherein Otto Eisenschiml is the Plaintiff and Fawcett Publications, Inc., is the Defendant, pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, pursuant to the notice, a copy of which is hereto annexed, before Benj. N. Goodglass, a Notary Public in and for the County of New York, at 420 Lexington Avenue, New York City, New York, on the 25th day of March, 1954.

It Is Stipulated And Agreed by and between counsel for the respective parties hereto that this deposition may be taken before Benj. N. Goodglass, a Notary Public of the State of New York, with the same force and effect as if taken before Myrtle Terhune, the Notary Public named in the notice herein.

It Is Further Stipulated And Agreed that all objections to any question on the ground of relevancy, competency or materiality, may be made at any time up and including the trial, excepting objections as to form.

JOSEPH JOHN MILLARD (residing at 2462 Belvoir Boulevard, Sarasota, Florida), the witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination by Mr. Martineau.

Q. Will you tell your name for the record, Mr. Millard?

A. Do you want my full name?

Q. Yes.

A. Joseph John Millard.

Q. And your address?

A. 2462 Belvoir Boulevard, Sarasota, Florida.

Q. And your occupation?

A. Author.

Q. Mr. Millard, calling your attention to the February, 1953, issue of "True Magazine", published by the defendant in this case, and particularly to page 34 to the article "America's Greatest Unsolved Murder", by Joseph Millard, will you state whether or not you are the Joseph Millard who is the author of that article?

109 A. I am.

Q. When did you write that article, Mr. Millard, according to your best recollection?

A. In the summer of 1951 I believe.

Q. And having written it did you reduce it to typewriting?

A. Yes.

Q. And what did you do with the typewritten manuscript?

A. It was submitted then to the Fawcett Publications specifically.

Q. You mean the defendant in this case?

A. Yes.

Mr. Martineau: I will supply you with a copy of the notice of this deposition and will ask you to mark it as Defendant's Exhibit 1.

(Copy of notice of examination, referred to, thereupon marked Defendant's Exhibit 1, 3/25/54.)

Mr. Martineau: I will now ask you to mark this as Defendant's Exhibit 2 of this date, and I will describe it for the record.

(Papers purporting to be typewritten manuscript of article "America's Greatest Unsolved Murder", referred to, thereupon marked Defendant's Exhibit 2, 110 3/25/54.)

Q. Calling your attention, Mr. Millard, to Defendant's Exhibit 2, which purports to be typewritten manuscript by you, consisting of, I think, 119 pages, will you please state whether or not that is the manuscript of this story in this action which you submitted to the defendant in this cause?

A That is.

Q. And after refreshing yourself by looking at that exhibit, your best recollection is that you did submit that to the defendant?

A. Yes,—

Q. When?

A. In the early fall of that year, I believe it was 1951, —it was submitted in the early fall.

Q. And thereafter did you enter into a contract with the defendant concerning the publication of this story?

A. I did, yes.

Mr. Martineau: I will ask you to mark this, Mr. Reporter, as Defendant's Exhibit 3.

(Contract dated January 30, 1952, between Joseph Millard and Fawcett Publications, Inc., referred to, thereupon marked Defendant's Exhibit 3, 3/25/54.)

111 Q. I will ask you to state whether or not Defendant's Exhibit 3 for identification is the contract that you refer to?

A. That is it.

Q. Does that refresh your recollection as to the time when the contract was actually entered into? I see it bears date January 30, 1952.

A. Yes, then I say it was written in 1951.

Q. You mean the story?

A. Yes.

Mr. Martineau: Off the record—

(Further colloquy off the record.)

Mr. Martineau: Would you mark this, Mr. Reporter, the photostat of a stipulation of counsel; it may be used in lieu of the original, as Defendant's Exhibit 3A.

(Photostat of a stipulation, referred to, thereupon marked Defendant's Exhibit 3A, 3/25/54.)

Q. Now, Mr. Millard, how much time did you spend in writing this story "America's Greatest Unsolved Murder", which I notice in your original manuscript which when initially written by you it was entitled "History's Maddest Murder Case"; that was the title you chose?

112 A. Yes.

Q. And then, the defendant, before its publication changed it to "America's Greatest Unsolved Murder"?

A. Yes.

Q. Did the defendant make any other changes in your manuscript submitted by you, and which has just been marked by the reporter Defendant's Exhibit 2 for identification?

A. Yes, quite a number of them; it cut it approximately in half, among other things.

Q. And are you able to state at this time whether or not the manuscript, as it appears to be cut as you have just stated, is substantially the same as it was finally printed in "True Magazine" in February of 1953?

A. Yes.

Q. In writing this manuscript, and when I say "This manuscript," I mean "History's Maddest Murder Case", in writing that manuscript, did you keep the works of Dr. Otto Eisenschiml before you, and refer to them, principally his book called "Why Was Lincoln Murdered" and his other book "In the Shadow of Lincoln's Death"?

Mr. Goertz: I object to that question as to form.

113 Mr. Martineau: He is just noting his objection; you go ahead and answer.

The Witness: I would like to have you clarify the wording of your question—

Mr. Martineau: Maybe I can make it this way:

Q. Did you do anything in the form of research on this manuscript, that you relied upon and followed?

A. A great deal, yes.

Q. Now, how much time did you spend on this research?

A. Well, the final writing of it, from the time it was ordered until it was turned in, I would say from four to four and a half months, but I had done a considerable amount before that hoping to get it in final shape, so that I cannot tell exactly how much time I spent.

Q. Let's see if we can get it this way: I think you

stated that the thing was finished and put into the hands of the defendant in September of 1951 or thereabouts?

A. Yes.

Q. And if your recollection is that you spent four or four and a half months after the time the defendant ordered these done, will you tell us what your best recollection is as to when the defendant put in that order to you?

A. As I remember it, my wife and I had just returned from an air tour of Central America, and that would 114 have been about the end of February.

Q. Of 1951?

A. Yes, so it was either the latter part of February or the 1st of March.

Q. In other words, is it fair to say that some time around the 1st of March, as you just said, in 1951, the defendant directed or commissioned you to write the manuscript which later evolved into "America's Greatest Unsolved Murder"?

A. That's right.

Q. Will you tell us what you did after the defendant gave you that order? What was the nature of your research?

A. Well, first, it was necessary to assemble all the books and papers and magazines that I had read on it—

Q. You mean on the subject of the assassination of Lincoln?

A. Yes, and then to get an idea of how much more I had to have, I set out to either obtain them or the use of them, which took a good deal of time; the actual writing probably involved one of these months. The balance was spent in assembling and organizing the material.

Q. Did you in connection with this consult Dr. Otto Eisenschiml, the plaintiff in this case?

A. No.

115 Q. You had consulted him before, had you?

A. When I had first started, I submitted the idea to him first, I think in 1945.

Q. You mean the idea of the assassination of Lincoln?

A. Of doing that story, the assassination of Lincoln.

Q. Tell us what you did, then, in respect of Dr. Eisenschiml?

A. This is not a very nice thing to say, but (addressing the plaintiff) I didn't know you at that time, and a neighbor of yours said "I couldn't think of writing about that if I did not know him". It was then that I met Ralph Newman. Meanwhile they had switched their interest to a couple of other book lengths and postponed this one, so that the time we met I was not working directly on this one and at that time, that is, originally I did not go in deeply enough into it,—I knew that it was wanted, the defendant wanted this story. At that time I did not know of these two books.

Q. You are speaking now of the initial period in 1945?

A. Yes.

Q. In any event, as a result of these meetings or conversations, you did get in touch with Dr. Otto Eisenschiml?

A. Yes, after I had done one book length, I was working on the second.

116 Q. What was the second one?

A. Lafayette Baker—"The Devil's Errand Boy."

Q. And they put that in "True" magazine likewise,—did it not?

A. They did.

Q. That was entered in July of 1947, isn't that right? Is that the one you referred to?

A. That is the one; it was in connection with my work on that that I met you (addressing the plaintiff).

Q. You mean when you met Dr. Eisenschiml?

A. Yes, Dr. Eisenschiml, that is correct.

Q. And where had you met Dr. Eisenschiml.

A. We met first by telephone, I believe, and (addressing the plaintiff) you invited me to your place, and I think our actual physical meeting was in your library.

Mr. Gertz: I wonder if we could place the time of that?

Q. Would you fix the time as closely as you can, bearing in mind that this article of "The Devil's Errand Boy" was published in 1947?

A. I would say it would have been in the fall of 1946, because rarely do they publish anything earlier than six months after it was bought.

117 Q. And that is your best recollection?

A. Yes.

Q. In other words, getting back to your meeting with Mr. Otto Eisenschiml, did you see some of his vast collection of Lincoln and the Civil War?

A. Yes, you see there were interrelated subjects, which was the reason Ralph Newman suggested that I should by all means meet Dr. Eisenschiml.

Q. How much time did you spend on that occasion with Dr. Eisenschiml?

A. Oh, I should say an hour and a half or so.

Q. In his library?

A. Yes.

Q. And was that the only time you saw Dr. Eisenschiml and did you talk to him?

A. I have a feeling that we met another time at the store, but I am not positive.

Q. You say at the store?

A. Ralph Newman's book store.

Q. In Chicago?

A. Yes, but I am not too positive on that.

Q. Now, getting back to March,—from March to Sep-

tember of 1951, in connection with your preparation
118 of this manuscript involved in this suit, I think you started to say something, and I got off the track with the nature of your research,—you said that one month was spent in the actual writing?

A. Yes.

Q. And the rest was spent in checking actual sources of what you had and what you thought you would need?

A. Yes.

Q. In what cities did you conduct your research for this piece?

A. Well, my final research for this piece was conducted mostly in New York. I was living then in New Jersey, but leaned heavily on the research in connection with the Baker story, "The Devil's Errand Boy", which was done in Chicago and Washington. I also leaned somewhat on research that I had done for another book length in Indianapolis and Louisville.

Q. Let me see if I understand you, sir; is this the picture, then, that you as appears from your story, "The Devil's Errand Boy", some of that had to do with the assassination of Abraham Lincoln?

A. Yes.

Q. You had done that research some years, several years before, and in that connection you met Dr.
119 Eisenschiml, as you told us?

A. Yes.

Q. When you did the work on the second piece, some of your research dovetailed with it?

A. Yes.

Q. And have you down here with you some of your books that you consulted in connection with the preparation of the article involved in this cause—

A. Yes.

Q. And also in connection with those parts of "The

Devil's Errand Boy", which you mentioned, which dovetailed or crossed—

A. Yes, I think I have most of the books here.

Q. On which you did research in this case?

A. Yes.

Q. And do you refer to the books that are spread on top of the radiator here (indicating)?

A. Yes, I do.

Q. They cover one radiator, which is about, how many feet—I am a poor judge of distance, would you say 25 feet, or 20 feet—well, 25 feet.

A. Yes.

Q. And about 3 feet of the other of Mr. De Witt's
120-1 radiator?

A. Yes, perhaps we could get the number of books—

Q. As a matter of fact I would like to have you read into the record, when quoting the sources that you say you used; could you do that briefly?

A. You mean just go along there and read them?

Q. Yes, would you do that?

A. Yes.

The Witness: Here I have:

"The Rebel War Clerk's Diary", two volumes.

"The Hidden Civil War".

"Abraham Lincoln" by Carl Sandburg, six volumes.

"War With the South", by Robert Tomes.

"Adventures of America"; the editor of that is—I will show it to you because I cannot pronounce it—by Kouwenhoven.

Over here we have—this is the "Reunions of the Society of the Army of the Tennessee", "1884 to 1887".

Now, this has no very direct connection, it was used for a purpose, and the title is "Homes and Fortunes in
122 the West and South" by Frederick B. Goddard.

The next is "The Ohio Archaeological and Historical Society Publications", Volume 6, published in 1898.

The next is "Active Service," by John B. Castleman.

The next is "Mitchell's New General Atlas," 1865. Some of the handpainted maps are dated a little earlier than that, and it covers the period.

Now, these are four volumes of "Harper's Weekly" for the years 1862, 1863, 1864 and 1865.

The next is "Statesmen of the Lost Cause," by Hendricks.

The next is "American Vaudeville, Its Life and Times," by Gilbert.

"Campaigns of the Civil War. Statistical Record", that is one volume out of a whole series.

This is entitled "War Life", and has apparently no author. It is a compilation of anecdotes, stories and news items and incidents.

The next is "A Treasury of American Folklore", by Botkin.

The next is "Mr. Lincoln's Wife", by Anne Colver.

123 "Treason History", by Felix Stidger.

Then we have "History of the United States of America", by E. Benjamin Andrews, Volume 4.

Then we have here "The Political Crime" by Gibson, copyright 1885.

The next is "Henry Ward Beecher" by Paxton Hibben.

The next is "The Field, the Dungeon and the Escape", by Richardson.

The next is "Elmer E. Ellsworth and the Zouaves of '61", by Ingraham.

The next is "Thirty Years In Washington", by Mrs. John Logan.

"The Personal History of Ulysses S. Grant", by Albert D. Richardson, 1868.

"A Youth's History of the Great Civil War in The United States", by R. G. Horton, 1867.

"A Century of Journalism in Peace and War", no author given, 1943.

"The Hero Boy", by Rev. P. C. Headley, 1864.

"Hassan's American and European Distance Tables" for 1872.

124 "General Court Martial Orders for 1867 to 1879."

If you want anything further, it is in the Adjutant General's office.

Then we have McClure's Magazine for February 1896, March 1896, September 1896, and for October 1895 and November 1895.

We have Scribner's Magazine for September 1892, July 1892, December 1891, July 1891, January 1891, November 1891, August 1892, October 1892 and May, 1891.

Then we have a magazine entitled "Lincoln Herald", for October 1947 and also "The Lincoln Herald" for June, 1947.

Then we have the Journal of the Illinois State Historical Society for December 1946, December 1944, March 1945, June 1946, September 1947, September 1944, June 1944, March 1944, September 1941, June 1942, September 1942, December 1942. I think there is some duplication in a couple of these. Then there is June 1945, March 1943, June 1943, December 1943, September 1943, March 1946,

October 1935, March 1942, June 1941, September 1941,

125 June 1940, December 1945, June 1946, September 1945,

June 1947, March 1946, December 1941, December 1947, December 1948, March 1948, and September 1946.

Now, these are transactions of the Illinois State Historical Society, and these are books and not magazines:

For the year 1930, the year 1912, the year 1931.

Now, "Paper in Illinois History;" it is the Illinois State Historical Society, a similar publication, for the year 1940,

but it is dated 1941; then the same, dated on the cover 1942. Now, here is 1941, but it is dated 1943.

The next is "Galena's Yesterdays", I guess you can call it a book, but it is almost a pamphlet, by Florence Gratiot Bale.

Now these are additional books:

"History of the Secret Service" by Lafayette Baker, 1867.

"Economic History of the American People," by Bogart, 1930.

"The First Year of the War," by Pollard, 1862.

"Grant and Sherman," by Hon. J. T. Headley,
126 September 1945, June 1947, March 1946, December
1941, December 1947, December 1948, March 1948, and September 1946.

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"The First Year of the War," by Pollard, 1862.

"Grant and Sherman," by Hon. J. T. Headley,
127 1865.

"The Second Year of the War", by Pollard, 1863.

"United States Official Register", 1861, printed in 1862.

"War of the Rebellion, Records of the Union and the Confederate Armies", Series 1, Volume XLII, Part 1, reports.

"In the Shadow of Lincoln's Death" by Eisenschiml, 1940.

"Reveille in Washington", by Margaret Leach, 1941.

"The Lives of Hancock and English" by Forney, the date I do not have; you see, it has been torn out here.

"Life and Speeches of Stephen A. Douglas" by H. M. Flint, dated 1863.

"Abraham Lincoln, His Life and Public Services", by Mrs. P. A. Hanaford, 1866.

"History of Political Theory and Party Organization in the United States" by Fess, it is dated 1907.

"The Life and Writings of B. R. Curtis", Volume 1, 128 1879; it is edited by his son, Benjamin R. Curtis.

"The Life and Writings of Abraham Lincoln" by Philip Van Doren Stern, 1942.

"The War of the Rebellion", by Theodore B. Gates, 1884.

"The Beard's Basic History of the United States", 1944.

"Time Exposure" by William Henry Jackson, 1940.

"The Great Rebellion", by J. T. Headley, 1866.

"Messages and Papers of the Presidents" by James D. Richardson, Volume X, 1899.

Now, this is "Sights and Secrets of the National Capitol" by author unknown, it is J. B. E., the title page is missing, but it is 1869.

"Abraham Lincoln and the Fifth Column", by George Fort Milton, 1942.

"Why Was Lincoln Murdered" by Otto Eisenschiml, 1937.

"The Life and Times of Samuels Bowles", by George S. Merriam, Volume I, 1885.

This is "The Assassination of President Lincoln" 129 by Benn Pitmann, 1865. R. Curtis.

"The Life and Writings of Abraham Lincoln" by Philip Van Doren Stern, 1942.

"The War of the Rebellion", by Theodore B. Gates, 1884.

"The Beard's Basic History of the United States", 1944.

"Time Exposure" by William Henry Jackson, 1940.

"The Great Rebellion", by J. T. Headley, 1866.

"Messages and Papers of the Presidents" by James D. Richardson, Volume X, 1899.

Now, this is "Sights and Secrets of the National Capitol" by author unkown, it is J. B. E., the title page is missing, but it is 1869.

"Abraham Lincoln and the Fifth Column", by George Fort Milton, 1942.

"Why Was Lincoln Murdered" by Otto Eisenschiml, 1937.

"The Life and Times of Samuel Bowles", by George S. Merriam, Volume I, 1885.

This is "The Assassination of President Lincoln" by Benn Pitmann, 1865.

130 "Meet General Grant", by W. E. Woodward, 1928.

"Butler's Book" by Benpamin F. Butler, 1892.

"The Life of Clement L. Vallandigham", by his brother, Rev. James L. Vallandigham, 1872.

"Memories of Many Men and Some Women", by Maunsell B. Field, 1874.

"Four Years in Secessia", by Junius Borwne, 1865.

"Sparks From the Camp Fire", by Joseph Morton, Jr., 1893.

"A Short History of the United States", by John Bassett, 1939.

"Life and Work of James A. Garfield", by John Ridpath, 1881.

"Sherman and His Campaigns" by Col. Bowman and Lieut. Col. Irwin, 1865.

"The People's Standard History of the United States", by Edward Ellis. The date is 1895. I will give you three volumes—here is Volume 4, Volume 5 and Volume 3.

"Putnam's Records of the Rebellion", by Moore, 1862 (Volumes 3), 1862 and 1863 (5) and (6).

"Wells' Every Man His Own Lawyer", 1869.

131 "Lincoln's Life, Stories and Speeches", by Paul Selby, MCMII.

"Around the World With General Grant", by John Young, Volume 2, 1879.

"The Golden Flood", by Herbert Asbury, 1941.

"The Trial of Andrew Johnson", published by order of the Senate, 1868, Volume I.

"Photography and the American Scene", by Robert Taft, 1942.

"Ladies of the White House", by Laura C. Holloway, 1883.

"Short History of the Civil War", by Fletcher Pratt, printed 1951.

"Photographic History of the Civil War", 10 volumes, by Francis Miller, 1911.

"The Wearing of the Gray", by John Cooke, 1867.

"Album of American History", by Adams, 1946.

"Battles and Leaders of the Civil War", 1884; this is a I volume people's edition.

"The Trials for Treason at Indianapolis", by Benn Pitmann, 1865.

"Leaves from an Old Washington Diary," by Elizabeth Lomax, 1943.

132 "Giant in Gray", by Manly Wellman, 1949.

"Report on the Organization and Campaigns of the Army of the Potomac", by George B. McClellan, 1864.

"Ohio Archaeological and Historical Publications", Volume 20, 1911.

Here is another journal of the Illinois Historical Society, September, 1948.

"Sketches in Crude Oil", by John McLaurin, 1896.

"Biographies of the World's Most Famous Men and Women", no author or editor given, it is 1940.

"Diary of a Public Man", probably Bullard is the one to list as editor on that, 1945.

The last one is "Footprints of Time and Analysis of Our Government", by Charles Bancroft, 1875.

Now, these are newspapers:

New York Evening Post, February 4, 1862.

The same paper for February 25, 1862.

The same paper for March 7, 1862.

The same paper for February 14, 1862.

The same paper for February 21, 1862.

133 "Giant in Gray", by Manly Wellman, 1949.

"Report on the Organization and Campaigns of the Army of the Potomac", by George B. McClellan, 1864.

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New York Evening Post, February 4, 1862.

The same paper for February 25, 1862.

The same paper for March 7, 1862.

The same paper for February 14, 1862.

The same paper for February 21, 1862.

134 Then there is the Daily Union, a newspaper from Washington, July 8, 1855.

By Mr. Martineau:

Q. Mr. Millard, were there some books, I should say source material other than those which you have just listed as being in this room which you used in connection with the preparation of the article?

A. Oh, yes, I would say many more.

Q. Where are those?

A. Those I did not own.

Q. But these are all your property which you listed?

A. Yes.

Q. And where have they been since you moved to Florida?

A. They have been in storage over in New Jersey.

Q. And did you at our request come up to New Jersey and bring them out of the storage warehouse?

A. Yes.

Q. And bring them over here so that we could take your deposition?

A. Yes.

Q. Incidentally, did you put them into storage, into a storage warehouse when you moved from New Jersey to Florida?

A. Yes.

135 Q. And when was that?

A. Almost immediately upon completion of this article, which I delivered to "True", which would make it in the fall of 1951, because I was anxious to get my boy into school with as little lost time as possible.

Q. You mean down in Sarasota?

A. Yes.

Q. In other words, is this the situation, then, that you moved down to Sarasota in the fall of 1951, and at that time you put the books into the storage warehouse—

A. That's right.

Q. And did you have some notes of this article and other articles?

A. Yes, I had boxes of notes which went into the bonfire.

Q. In other words, you had basic notes which you listed for use—

A. Yes.

Q. —and which antedated, or preceded, I should say, your original manuscript, Defendant's Exhibit 2?

A. Yes.

Q. And did I understand you to say that they were burnt up on the occasion of your moving to Florida, along with other notes and other stories?

136 A. Yes, practically with a lot of other things that did not seem essential at the time.

Q. That being in the fall of 1951, was that before you heard of any controversy arising over your article?

A. Oh, yes, it was even before it was published.

Mr. Martineau: I guess the record shows that the article was published in February of 1953, and the notes which you just mentioned were disposed of in September of 1951.

The Witness: Yes.

Q. Now, not having those notes, then, would you describe for us those notes; first of all were they in a box?

A. Yes.

Q. How big a box was it?

A. Well, they were stored in a red box, I guess a little less than 2 feet square, a sort of telescope box, and so high (indicating).

Q. Indicating about 15 inches high?

A. Well, it is purely a guess.

Q. And will you tell us just generally in what shape those things were, those notes, as to whether they were typewritten or in longhand or in both, or what?

A. Some were typewritten, some were longhand
137 which were on scraps of envelopes; some were on foolscap sheets, I mean very ordinary note paper, whatever I had at the time.

Q. I forgot to ask you this, were you at the time of the sale of the article to the defendant, or had you ever been, an employee of the defendant corporation?

A. No, I had not.

Q. Now, since this law suit began, Mr. Millard, Dr. Eisenschiml's claims of infringement were made in this suit, have you had occasion to study Dr. Eisenschiml's affidavit setting forth his claims, wherein he says your article, "America's Greatest Unsolved Murder" infringes his two books, "Why Was Lincoln Murdered" and "In the Shadow of Lincoln's Death"?

A. Yes.

Q. Now, calling your attention to Schedule C of Dr. Eisenschiml's affidavit, that is where he sets up in parallel columns some 66 items, 66 or 67, I think it comes out 67 items, in which he contends that you or your article infringes his work; you are familiar with that schedule, are you?

A. Yes, I am.

Q. And do you recall, for the sake of the record, that he has on the left-hand side, in the left-hand column the 66 excerpts from "True" magazine, from your article, that is—

138 A. Yes.

Q. And then in the right-hand column he has the

excerpts from his two books, and he has each one juxtaposed with the other one, do you recall that?

A. Yes, I do.

Q. Now, would you turn to Item No. 1, I am going to refer to it as Quote No. 1. Do you have a copy before you, Mr. Millard?

A. Yes.

Q. Referring to Quote No. 1, where Dr. Eisenschiml says that on Page 36 of "True" magazine, you say in your article (reading):

"In the little village of St. Joseph, Minnesota, 40 miles from the nearest railroad or telegraph, men met on the street"—then there are some skip marks, and then the words appear "and asked", and again some skip marks, and the quote ends. Will you state where, from what source of material, that is, you got that quotation for your article?

A. Well, that one came from Father Chiniqui's "Fifty Years in the Church of Rome", which I believe is the correct title of that, and I was put on the trail of that by a gentleman, I think Dr. Eisenschiml had some dealings with, a man by the name of Forbes Brown, who has probably badgered everyone who ever was interested in the assassination with his theory that it was promulgated by the Catholic Church, and in doing that he put me on the trail of this book; I think that covers that one.

Q. You mean the book by Father Chiniqui?

A. Yes.

Q. Now, are there any other sources for that statement in Quote No. 1?

A. Well, indirectly, in the "Assassination and History of the Conspiracy", published in 1865, at Page 54, there is merely the mention that the news of the assassination was known in a great many places before it occurred, and this was investigated without finding any reason, without solving the mystery.

Q. Now, that last source that you mentioned, that doesn't mention St. Joseph specifically?

A. It does not mention it specifically—

Q. Well, have you finished?

A. Partly, Quotes 1, 2 and 3 are on the one subject.

Q. You mean by that?

A. They are all quotes on prior publication.

Q. Well, let's consider that—

A. Father Chiniqui is the source for Quote 1 only. The others can be found in the archives of the War De-
140 partment and in the Congressional Club.

Q. What was the Congressional Club?

A. That was the ancestor of what is today the Congressional Record. It was a day to day report of the doings in Congress.

Q. Was anything said in that Congressional Club about a Senate investigation conducted by Ben Butler?

A. Yes, there was a long investigation, but it got practically nowhere, and it brought out the fact that that mystery was never solved, which was my point. I tried to bring out mysteries never solved.

Q. That last one refers to Quotes 2 and 3 also?

A. Yes.

Q. And the same historical fact is stated likewise in Dr. Eisenschiml's work?

A. Yes.

Q. As stated in his Quote 1, I believe and Quote 2, and Quote 3 likewise, is that so?

A. Right. Now, Quotes 4 and 5 also come together.

Q. Let me ask you this one question—

A. The two are on the same subject, Quotes 4 and 5 can be answered on the same source.

Q. Before we get to those, can you hold that for just a minute?

A. Yes.

141 Q. Before you wrote your article you, of course, had read Dr. Eisenschiml's work, had you not?

A. Yes.

Q. You do not pretend that you had not read Dr. Eisenschiml's work?

A. Oh, no.

Q. Who is admittedly one of the greatest authorities on the assassination of President Lincoln.

A. That's right.

Q. You say Quotes 4 and 5 which appear in Dr. Eisenschiml's Schedule C can be considered together?

A. Yes. The source of both is the same, of course, "Grant's Memoirs".

Q. Now, what page of "Grant's Memoirs"?

A. Well, I believe Volume 2, Page 640 covers that.

Mr. Gertz: Let the record show that the witness is consulting cards.

Mr. Martineau: All right.

Mr. Gertz: And those are the cards that were drawn up when—

Mr. Martineau: We will show that.

Q. When were those drawn up?

A. Largely within the last two weeks, in an attempt
142 to recapture a job that I had completely forgotten, having done it a couple of years ago; it was out of my mind. I had been on another history, and I had forgotten about that—

Q. Now, just to get the record clear, in order for you to prepare yourself to testify, you listed your authorities for the challenged statements?

A. That's right.

Q. So that you could quickly and accurately refer to those authorities?

A. Yes.

Q. Now, I think you gave the page of "Grant's Memoirs"?

A. Yes, I did, Page 640.

Q. Is there any more description? Are those his personal memoirs?

A. Yes.

Q. Well, is there any more information that is necessary to run those down, as to where it was published, and who got them together?

A. I don't have it here.

Q. Was it in New York, by Charles L. Webster, in the year 1885?

A. Probably.

Q. And does that refresh your recollection?

143 A. Yes, I think that's it.

Q. Now, as far as we have gone, up to Quote 5, will you tell us whether or not in writing your article you copied from Dr. Eisenschiml's works?

A. No, I did not.

Q. Now, will you take up Quotes 6 and 7? May they be considered together—

A. Yes, they refer to the subject which can be considered with one answer.

Q. This deals with General Grant—this still deals with General Grant, doesn't it?

A. Yes, this refers to railroad time schedule.

Q. Just to make the record clear, in Quote No. 6, which is on the last page of Exhibit C of Dr. Eisenschiml's affidavit, you say this (reading):

"With all his (Gen. Grant) very natural yearning to rejoin children so long separated from their father * * *? He, Grant, had just returned from City Point, not too far from Burlington",—that is Quote No. 6.

Quote No. 7, from your piece is, Mr. Millard (reading):

"And that 6 o'clock train he took at, it was a Camden

and Amboy local, requiring two wearisome charges
144 during the night * * *. He could have gone to the theatre, taken an early morning express and reached Burlington * * * at 2:58 in the afternoon."

Now, what is your source for those two quotes?

A. Well, my historical source, of course, the thing is brought up, the matter of this train trip is brought up by Gen. Porter in his article of "Campaigning with Gen. Grant," which appeared in Century Magazine for October, 1897.

Q. What does Gen. Porter have to say on the subject?

A. He deals only with the fact that it was a tiresome trip requiring two changes, and at the time I had a little book over here, that Hassan's railroad guide, which gave the timetables for railroads of the United States for seven years later, and in that they refer to the existence of the railroad guides for the past years, and I did not have them and did not make any attempt to get them, and so I did use from you (addressing the plaintiff) the schedule as you got it here. I took it for granted that if I went looking around, some collectors had Hassan's original guides, and rather than do that I used what Dr. Eisenschiml published as the schedule of the thing.

Q. And when you said you, "you" in that answer, you were addressing yourself to Dr. Eisenschiml?

145 A. Yes, I realize that is confusing to the reporter.

Q. In other words, did you have the facts on the train No. 1, the one that Grant actually took but not the comparative time-tables on train No. 2?

A. Yes, that is what I did not have.

Q. And the actual time-table in regard to train No. 2 you got from Dr. Eisenschiml's work?

A. Yes.

Q. Which Dr. Eisenschiml, I take it, published as an historical fact, did he not?

Mr. Gertz: Objection.

Q. When you say, Mr. Millard, that you took it from Dr. Eisenschiml you refer, do you not, in what he says in Quote No. 7 which appears on Page 2 of Exhibit C?

A. The latter half of it—

Q. Wait a minute, let me get this straightened out. Well, I refer, Mr. Millard, to Page 2 of Exhibit C and to Dr. Eisenschiml's affidavit, where he says in substance,—I am not taking it all (reading):

"By traveling on the morning trains they could have taken in the performance and still have arrived in Burlington the early afternoon" (then follows a time-table
of the Camden and Amboy Railroad giving the de-
146 parture date of the mail at 6 o'clock P. M., and the
arrival of the express at 2:58 P. M."

Now, that is from Dr. Eisenschiml's affidavit.

Referring to Page 56 of his book "Why Was Lincoln Murdered" from which that purports to be taken, I note here at the bottom a time-table of the Camden and Amboy Railroad. Is that the time-table that you say you consulted as your source?

A. Yes.

Q. For the statement in your Quote 7?

A. Yes, that's right.

Q. That brings us now to Quote No. 9—

A. Quote No. 8.

Q. Pardon me, Quote No. 8, that's right, which is on Page 2 of Dr. Eisenschiml's Exhibit C. What is your source for Quote No. 8?

A. Well, that one I would say is every writer who has ever touched on Lincoln, specifically Badeau—

Q. Is that Adam Badeau?

A. Yes.

Q. Give us the name of the book, will you?

A. "Grant in Peace", called particular attention to it.

Q. In what pages?

147 A. At Page 355, I think is one specific point; the same thing is covered in "Meet General Grant" by Woodward, at Pages 345 and 346, and in Sandburg, Volume 4, Pages 261 and 262. There are innumerable other instances where that is brought out.

Q. What pages of Sandburg, did you say?

A. 261 and 262 of Volume 4.

Q. And that is "Meet General Grant" by Woodward?

A. Yes, that is Pages 345 and 346.

Q. Getting back to Adam Badeau, which you mentioned before, is there any reference on Pages 357 and 358 concerning Mrs. Lincoln's Jealousy?

A. Yes, I believe there was. I believe I have that on another sheet. I believe I have more information on that, yes, Pages 357 and 358, he tells of her jealousy on the trip to City Point, I believe that is when she had her blow-up with Mrs. Ord, and then turned her fury on Mrs. Grant.

Q. By "she", you mean Mrs. Lincoln?

A. Yes, that's right, Mrs. Lincoln turned her fury on Mrs. Grant.

Q. And how about at Page 362, is there another instance there?

A. Yes, that is when Mrs. Lincoln flared up at Mrs.

148 Grant for sitting down before being invited to, and Badeau says himself "Mrs. Grant was tired out with what she endured and decided not to go to the play." Now, what he refers to by "what she endured", he might have implied all these flare-ups.

Q. Now, are there any other authorities?

A. Yes, there is Ward Hill Lamont's "Recollection of Abraham Lincoln", where at Page 278 he quotes Grant as saying that "A note was received by me from Mrs. Grant saying that she was desirous of leaving the same evening on a visit to her daughter up in Burlington. Some inci-

dents of a trivial character had influenced this determination, and she decided to leave by an evening train."

Q. So, to sum up your historical authority for Item No. 8, or Quote No. 8, you have referred to four separate historical sources?

A. Yes.

Q. None of which happened to be Dr. Eisenschiml's, is that correct?

A. That is correct, yes.

Q. Now, that brings us to Item 9, or Quote 9 on Dr. Eisenschiml's Exhibit C at Page 2.

A. I see that I will have to get this all together so that I do not need any prompting.

149 (Further Colloquy off the record.)

Q. Now, in your Quote 9, which appears in Exhibit C at the place I just indicated, the quote is this (reading):

"Stanton * * * went home to a leisurely dinner. Afterwards he went over for a chat with the invalid, Seward, and sat around with other guests for hours. Then the sound of a band reminded him that the procession was coming to serenade him. Stanton hurried home, made them a pretty speech and went up to bed. He was standing in his long drawers, almost ready to retire, when a servant burst in with the news of Lincoln's assassination."

Now, will you tell us what was your historical source for that statement?

A. Well, the closest source is Mooreville's story, in an article entitled "Dickens Stanton Seminar and Story", appeared in the Atlantic Monthly for April 1930, Pages 464-465, he details exactly those actions, and I will quote here, referring to Stanton's actions, the night of the assassination, "He went home and dined as usual, and then went to see Mr. Seward * * * (and) found six or eight people there and stayed there chatting until he heard the music of a procession which had notified him that it would

call on him that night * * * he went home, made them a little speech * * * and went upstairs * * * to bed. He
150 was nearly undressed * * * when a man had come to the door * * * and Mrs. Stanton had let him in, and that was the man who was announcing the assassination." That is one source.

Q. And that is the closest—

A. Yes.

Q. That is what you said?

A. Yes. Now, Oldroyd in his book on "The Assassination of Abraham Lincoln", published in 1901, puts it much shorter, he said that "band of music and a large crowd proceeded to the residence of Secretary Stanton * * * and serenaded him."

Q. I do not see anything there about Stanton having any long drawers, or any drawers at all.

A. I think I took poetic license, referring to the long drawers; you see, on a cold night, because it was a cold night with a fog, if he was standing around in his bed room, I used that long drawers, but I wouldn't swear to it.

Q. Now, you see in the corresponding part, in Dr. Eisenschiml's excerpt, he has Stanton "nearly undressed" when he got this news he doesn't say anything about long drawers there either, does he?

A. No, that was my imaginative insertion.

Mr. Martineau: Off the record—

151 (Further colloquy off the record.)

Q. What will you say as to this Quote No. 9, did you list this from Dr. Eisenschiml's work? He claims you pirated it from his work.

A. I am afraid I lifted it from Mr. Storey's work, as nearly as it was lifted,—you see, it was a recital of the thing as it was supposed to have happened.

Q. Now, let's go to Quote No. 10, which is likewise on Page 2 of Exhibit C of Dr. Eisenschiml's affidavit. This is about Dr. Stanton (reading):

"And afterwards Stanton swore under oath * * * that Abraham Lincoln had not been to the War Office that day at all."

Did you pirate or steal that from Dr. Eisenschiml?

A. No, I did not, because that comes from Flowers'—

Q. What are the initials of Flowers?

A. F. A. Flowers.

Q. Of Edwin McMinton Stanton?

A. Yes.

Q. When was that published?

A. 1905, at Page 271.

Q. Will you give us that?

152 A. (Reading) "Stanton under oath testified * * * as follows: 'The order of Mr. Lincoln of April 12 on file in the War Department is the last order he ever made of which I have any knowledge. It was the last time he was in the War Department.' "

Q. In other words, you understood that to be an exact statement of what Stanton testified to in some judicial proceedings?

A. Yes, and it was so flagrantly in opposition to the familiar story of Lincoln's last visit in the telegraph office that I think I said it stands out like a sore thumb to anyone looking into the events.

Q. Now, will you come to Quote No. 11, which is the last one on Page 2 of Dr. Eisenschiml's Exhibit C; that is the one where you were quoted as saying (reading):

"How about the busy Major Eckert? * * * He did not return to the office that night. There is no record now of how he spent the evening, but the news of the assassination reached him at his home, where he stood in his bathroom shaved."

Did you lift that from Dr. Eisenschiml?

A. No, that came from two sources, and I do not have the page numbers here. I know part of it comes from

David Bates in his book "Lincoln in the Telegraph
153 Office", and also from a book called "The Great American Myth," by George Bryan, where he calls special attention to Eckert's actions or what little is known of them on that night.

Q. Now, will you come to Quote No. 12, which is at the top of Page 3 of Dr. Eisenschiml's Exhibit C, and I will quote it (reading):

"They left * * * David Bates handled the War Department telegraph that night, and he yawned to one of the dullest evenings * * *. Only three messages were recorded that night * * *."

Now, did you, Mr. Millard, pirate or plagiarize that—

A. No, I did not.

Q. Tell us what was your historical source for that account?

A. David Bates, again, in "Lincoln In the Telegraph Office", 1907.

Q. At what page?

A. Who says at Page 370 (reading): "I was on duty in the cipher room that evening" and that is the only quote I took on that. I went to the official records, Series 1, Volume 46, in which the only three telegrams recorded
154 that night were, one from Washburn to Stanton, at Page 744, one to Lincoln from Major General Ord, which is on Page 748, and one from Stanton to Ord on Page 749; those are the only three recorded.

Q. And so, is it fair to say that using this historical source, or those historical sources, you just mentioned, you stated the facts and drew the inference which appears in Quote 12 from your work?

A. Yes.

Mr. Gertz: Objection to that.

Mr. Martineau: He answered "yes"; but just note the objection by Mr. Gertz.

Q. Now, let's come to Quote 13, which appears on Page 3 of Dr. Eisenschiml's Exhibit C. This is a long one relating to John Parker—

A. And that is to be considered with these other quotes, 13, 14 and 15.

Q. As they appear in Dr. Eisenschiml's affidavit at Pages 3 and 4, you say they can all be considered together?

A. Yes, where I refer to John Parker.

Q. Now, did you lift or pirate the quotes attributed to you by Dr. Eisenschiml in Quotes 13, 14 and 15 from Dr. Eisenschiml's works or any of them?

155 A. No.

Q. What are your historical sources for the statements you make in those three quotes?

A. In many cases my historical sources are from several places, which I will say included Dr. Eisenschiml's—for instance, Sandburg, in Volume 4, Pages 272 and 273 gives virtually the full story of Parker's life, and "The Great American Myth," at Page 165 and at Pages 220 through 224 covers the remainder of it.

Q. Any others?

A. That I think is about what I have on the subject here.

Q. Did you ever read William H. Crook's "Through Five Administrations"?

A. Yes. Here I am answering only in terms of where I would know of Parker's life or any details of it. Crook brought up the position of Parker and wondered audibly why Parker was never brought to trial so he would focus attention on Parker. Those are the quotes that supply the details on Parker's life, who he was, and most of the matters relating to him.

Q. Is there a writer called Elizabeth Keckley?

A. Yes.

Q. What did she write?

156 Mr. Gertz: Objection to all as leading questions.

A. She was the Negro maid, I believe, of Mrs. Lincoln, who wrote a book "Behind the Scenes," and she also mentioned Parker in there and tells particularly, as I remember it, about the scenes between Mrs. Lincoln and Parker after the assassination when Parker had the unmitigated gall to take up his post at the White House, and she went into hysterics, and accused him of being one of the murderers of her husband.

Q. I think you mentioned Crook before, didn't you?

A. Yes.

Q. Is that all you want to say about Crook?

A. Yes, there are a good many other references to Parker, but on these three points, dealing with the evening out, and facts of Parker's life which were not too readily available,—but where available the sources I gave.

Q. Calling your attention to Quote 15, which we have considered in a series with 13 and 14,—have we not?

A. Yes.

Q. Do you have Sandburg, Volume 4 here?

A. Yes.

Q. Can you reach it?

A. Yes.

Q. Well, will you look at Pages 272 and 273 and 157 see if you find anthing there about Parker?

The Witness: Do you want it read?

Mr. Martineau: Yes, if you will, please.

The Witness: In its completeness?

Mr. Martineau: Yes.

A. (Reading.) "The bodyguard in whose line of duty it fell to be with the President this evening was John F. Parker. He was one of four officers detailed from the Metropolitan Force of the City for White House duty, for watching the President, or rather in staying close to the President and keeping a sharp eye on the hands, the possible

wayward hands of anyone who might have designs on the life and person of the President. Of these four guards only one had afterward appeared, had a questionable record,—and he was John F. Parker. On this evening he was 35 years old lacking one month, born in Frederick County, Virginia. He had worked at the carpenter's trade in Washington, enlisted in the army as a three months man, in '61 joining the Metropolitan police as a patrolman. At his home on 750 L Street, he had then a wife and three children. Thus far the known record showed good behavior.

"On October 14 of '62, he was put on trial, the Police Board finding he had been profane and insolent
158 to the owner of a grocery store, who complained of patrolmen loafing in front of his place of business.

"He had used 'disrespectful' language to a superior officer in a way that if it continued, 'must lead to insubordination'. For this he was reprimanded and transferred to another precinct.

"In March and April of '63 John F. Parker was on trial on various charges of being found asleep on a street car when he should have been patrolling his beat, of conduct unbecoming an officer, through five weeks of residence in a house of prostitution where it was alleged he had been drunk, had been put to bed, had fired a revolver through a window, the Board found he was at a house of ill fame with no other excuse than that he was sent for by the keeper (Miss Annie Wilson).

"Although there was no evidence that there was any robbery there, or disturbance of the peace or quiet of that neighborhood, and though in addition Parker was charged with willful violation of the police rules and regulations, having again used highly offensive language toward a superior officer, the Board took no action, and within three months heard testimony that he had used insulting lan-

guage to a lady who had complained of the conduct
159 of Parker in her neighborhood as disorderly.

"The list of trials, the repeated similar charges against Parker, the Board's own language about his conduct, and the findings in the evidence did not merely indicate but showed conclusively that he was slack rather than vigilant, of loose habits rather than of a steady and reliable man, a cheap and slipshod specimen of a police officer rather than a sober and dependable operative for highly responsible work. How Parker found his way into the White House, put back there, was not clear in the records. On April 3, however, when he was drafted for army service, Mrs. Lincoln on executive mansion stationery had written to the District of Columbia Provost Marshal, James R. O'Beirne, a certificate 'that John F. Parker * * * has been detailed for duty at the executive mansion by order of' (signed) Mrs. Lincoln."

(Further colloquy off the record.)

Q. Is there more about Parker there? I don't want you to read more about him—

A. Oh, yes, there is more.

Mr. Gertz: At Pages 272 and 273?

The Witness: Yes.

Q. And is that your source for the statement at-
160 tributed to you in Quote No. 15?

A. That is part of the source: that is, I would say, one source.

Q. And what is another source?

A. Another source is the book I mentioned, "The Great American Myth," for additional information on Parker, and for this much of the story is repeated with some additional details.

Q. Well, have you ever, except in Sandburg and in Dr. Eisenschiml's work, seen the exact quote of Mrs. Lincoln's letter?

A. No, I have not.

Q. That appears in these two historical sources, Sandburg and Eisenschiml?

A. Yes, I rather think where Sandburg deleted part of it here, that I believe it was from Dr. Eisenschiml that I supplied the missing words. I recall that now, it seems.

Q. Now, let's come to Quote No. 16 which appears at Page 4 of Dr. Eisenschiml's Exhibit C; that relates to the four persons supposedly in the box the night of Lincoln's assassination, and as to the question where was Charles Forbes, Lincoln's valet—

A. Yes.

161 Q. Will you state whether or not you got the language attributed to you in Quote 16, from, that you lifted that from Dr. Eisenschiml?

A. No.

Q. Well, what is your source for that?

A. There are several sources. There, again, the same thing is brought out and discussed quite fully in "The Great American Myth" where Forbes was at the moment, and Forbes' own statement later,—I didn't have at the time.

Q. When you say "at the time," you mean at the time you wrote your article?

A. At the time I wrote the article, but in the Journal of the Illinois Historical Society.

Q. For what month, and at what page?

A. For September 1946, Page 367, there is an eye witness account of the assassination, in which the lady who quoted or was writing the article, I don't remember which at the moment, where she specifically mentions that she watched the presidential party come in and go to the box, and that Lincoln and Mrs. Lincoln and Major Rathbone and Clara were accompanied by two messengers. Now, the guards were frequently called messengers, so she does

not identify them, but she makes it quite clear that she
162 saw two guards go into the box with the Lincolns and nothing more is said.

It is enough to arouse curiosity there, and I went further, and so "The Great American Myth" makes quite a to-do of Forbes' location, of when he was in the box, and when he was not, and there is Gobright's report of handing a dispatch to Forbes, and I cannot remember his exact wording, but something to the effect that there was no one on guard at the box, or at the door, except Forbes. There is also kind of a curious quote I ran across, and I frankly do not know what it means, but it seems to apply to this, and it aroused my curiosity, too.

Q. Is this another source?

A. Yes.

Q. Well, what is the source?

A. This is a man by the name of Abott A. Abott.

Q. And what is the name of his book?

A. "The Assassination and Death of Abraham Lincoln, President of the United States of America", published in 1865.

Q. Can you tell us what he said about the subject?

A. In one spot, I don't remember the page number, he says (reading): "There were no other persons in the box and no one entered or left it until about the time of the assassination." That is in an intriguing remark, I don't know what he means.

163 In W. J. Ferguson's book "I Saw Booth Shoot Lincoln", published in 1930, he mentions Parker and his failure to be in the box, and he also speaks of Forbes, or appears to speak of Forbes, but I did not take the exact quotation, and I do not believe it is conclusive one way or the other, but he speaks about Forbes' location either on the inside or the outside or being near there.

Q. Now, let's come to Quote No. 17, at Page 4 of Ex-

hibit C, that is where you are quoted as saying in your article (reading): "Why was he, *Forbes, never mentioned* in a single account, never questioned by news hungry reporters * * *" Did you steal that from Dr. Eisenschiml?

A. No, but my card, in which I was attempting to recapture lost answers, I wrote four words "common sense asks that". That is my remark. I say that is such an obvious thing, if he wasn't there, why wasn't he? I cannot remember looking for sources; it is just the natural thing—

Q. Now, Dr. Eisenschiml in the opposite No. 17 apparently came to the same conclusion,—that is, came to the same conclusion and asked the same question.

A. Well, I don't see how anyone can fail to if they were looking at it at all.

Mr. Gertz: I think our stipulation ought to
164 cover all objections, because I find your last question was argumentative.

Mr. Martineau: If it is argumentative, that would be covered as to substance, too. I mean, where, for example, it is leading, I think that argumentative is covered by materiality.

Mr. Gertz: Anyway, I object to it and I move that the answer be stricken.

Mr. Martineau: This is off the record—

(Further colloquy off the record.)

Q. You mentioned, or said something about Quote No. 18, which is the last one on Page 4 of Dr. Eisenschiml's Exhibit C, that is more about Forbes—

A. Yes.

Q. Whether he was in the box or out of the box, or what, as it appears in your quote from the article—

A. Yes.

Q. Now, did you steal that or pirate that—

A. No, I got that from the National Republican in

Washington when I was studying that issue of June 8, 1865, in which Mr. Hanscom's article is published.

Q. Did you have any other sources for that?

A. No, I think not.

165 Q. I notice Dr. Eisenschiml gives that Washington National Republican as his bibliography, too.

A. That is where I read it; I spent two weeks in the library, yes,—of Congress and the archives, and among other things, reading all of the newspapers of the period in order to get the details.

Q. In other words, Dr. Eisenschiml gives that as his author, and you read that authority yourself in two weeks study in the archives in Washington and the Congress Library?

A. Yes.

Q. When was that?

A. I have a special search card to get into the archives, and they give you a going over before they issue it to you.

Q. And do you have that handy?

A. I think so (producing paper).

Mr. Martineau: Will you please mark this card as Defendant's Exhibit 4, the card produced by Mr. Millard headed "The National Archives," and numbered 31982.

(Card produced by Mr. Millard, headed "The National Archives," No. 31982, referred to, thereupon marked Defendant's Exhibit 4, 3/25/54.)

Q. I notice this card is dated April 21, 1949.

A. Yes.

166 Q. And it says it is good until April, 1950, April 20.

A. Yes.

Q. Does that fix your memory or assist you in telling us when it was that you made this research in the National Archives?

A. This was my second time. I had an earlier card which I destroyed when I got the new one,—the earlier one was in 1946, and the second one was in 1949.

Q. In other words, you made a research before the Defendant Fawcett Publications gave you the specific permission to write the piece that is involved here, is that right?

A. Well, there had been tacit agreement that one of those days they would give me the go ahead on it.

Q. You mean Fawcett Publications?

A. Yes.

Mr. Gertz: It is pretty hard to judge how far our stipulation goes, Mr. Martineau. I will object to that answer and will move that the answer be stricken.

(Further colloquy off the record.)

Q. Do you recall any other documents bearing on the subject and source materials for your article here that is involved in the law suit that you studied at that time 167 at the National Archives?

A. Well, I was studying the newspapers in the archives. I was trying to find any papers or actual documents on the assassination or the chase—

Q. Of Booth, you mean?

A. Yes, and I was also dovetailing that in with some other research, and it is a little hazy now. I had much more value, I know, out of the newspapers and out of the Congressional Club at that time which were the more outstanding source in my mind.

Q. Will you come now to Quote No. 19, which appears at Page 5 of Dr. Eisenschiml's Exhibit C, that is the one about whether or not Hanscom ever did go the president's box; do you see that one?

A. Yes.

Q. Will you tell us what your historical source for that statement was in Quote 19?

A. For one, the "The Great American Myth" quotes this at Page 178, and the documentation for it comes from the New York Tribune of April 17.

Q. Of what year?

A. 1865, when McGowen made his statement there, in which he says (reading): "I remember * * * a man 168 * * * passed me and inquired of one sitting near who the President's messenger was and learning exhibited to him an envelope apparently official * * * that man went away."

Q. Did you lift that Quote 19 from Dr. Eisenschiml or pirate it from him?

A. No.

Q. Now, will you come to Quote No. 20 of Dr. Eisenschiml's Exhibit C at Page 5, that says briefly (reading): "At the trial McGowen's testimony made no mention of either a name or message * * *." Can you tell us what your historical authority for that statement was?

A. Well, I studied the transcript of the trials from three versions.

Q. And what were those versions?

A. Ben Perley Poor, in Volume 1, Pages 94 and 95, gives the McGowen testimony as it was recorded at the trial.

Q. The trial of the Lincoln conspirators?

A. Yes. Benn Pitmann.

Q. Yes, go on.

A. And at Page 78, it is also in another transcript of the trial, I do not have the page number.

Q. What is this other transcript?

A. It was a transcript made by the Philadelphia 169 Inquirer. They took independent notes on the thing and published their own version which agrees very closely with Poor's in most cases.

Q. And speaking of that last source, the Philadelphia Inquirer's transcript, can you tell us where that is at the present time? Is it available to the public?

A. Oh, yes, it is in the New York Library. I was limited in my sources, I had to come here.

Q. In other words, to get this straight, you did not use the Philadelphia Inquirer as a source when you wrote the article?

A. No.

Q. But you are telling us that the same material appears there?

A. Yes, I used Poor's and Pitmann's; in fact I did not know the existence of the Philadelphia Inquirer.

Mr. Gertz: I move that that be stricken.

Q. In which you are saying that the same material that you found in Poor and in Pitmann which you did use, you have since found appeared in the Philadelphia Inquirer transcript?

A. Yes.

Q. Will you come to Quote No. 21 now, at Page 5 of Exhibit C (reading): "* * * the coachman Burns 170 * * * at some time during that evening Forbes and Parker came out together and took him into the saloon next door for a drink."

Mr. Gertz: Are you quoting from the copy that he gave you?

Mr. Martineau: I was quoting from the affidavit. Don't take this for the record—

(Further colloquy off the record.)

Mr. Martineau: Do you have a marked copy here?

Mr. Gertz: Yes, Page 109.

Mr. Martineau: If you have it I will read the exact text.

Mr. Gertz: The first column, third from the last paragraph—

Mr. Martineau: I will read it. This is from Mr. Millard, at Page 109 of the magazine "True" for February 1951 (reading):

"Now, the coachman, Burns, waiting by his carriage, must be allowed his small contribution to the chaos. This was the sworn testimony that at some time during that

evening Forbes and Parker came out together and took him into the saloon next door for a drink. It does not say when this occurred, and apparently no one bothered to ask."

171 That covers it.

Q. Now, did you pirate or lift that from Dr. Eisenschiml's works?

A. No, I have a statement before me here from Sandburg, Volume 4, Page 279.

Q. What does Carl have to say about that?

A. (Reading): "Either between acts or at some time when the play was not lively enough to suit him, or because of an urge for a pony of whisky under his belt, John F. Parker leaves his seat in the balcony and comes down to the street and joins companions in a little whiff of liquor—this on the basis of the statement of the coachman Burns, who declared he stayed outside on the street with his carriage and horses, except for one interlude, when 'the special police officer (meaning John F. Parker) and the footman of the President (Forbes) came up to him and asked him to take a drink with them which he did."

Q. And that is from Sandburg?

A. Yes, that is the end; the same thing is found in "The Great American Myth" at Page 175. There are other sources, but I fail to recall them now.

Q. Are those two sources the sources which you used in making that statement?

172 A. Yes, quite probably, since they were available, and since their books are used.

Q. What I am getting at is did you consult those sources, not just read Dr. Eisenschiml and copy from him?

A. I assuredly did.

Q. Now, let's come to Quote No. 22 in Exhibit C (reading): "Later that night Clara Harris gave her sworn statement * * * the statement should have aroused feverish interest, but it did not, for the simple reason that Clara

Harris made another statement a couple of days later and left that part completely out."

Did you steal or pirate that from Dr. Eisenschiml?

A. I am rather afraid I did. I have sources for her later statements, but as I remember I had no source other than Dr. Eisenschiml for her original statement.

Q. Let me see if I understand this: she made two statements, did she?

A. She made two statements.

Q. You had a source for one statement, is that right?

A. Yes.

Q. But not for the other?

A. Yes.

173 Q. And what was the historical source for the statement—

A. I had the New York Herald for April 16, 1865, where her statement appears.

Mr. Gertz: Would you read the statement from the New York Herald?

The Witness: I do not have the direct quote. But it quotes Miss Harris' affidavit, in which she refers to seeing another man struggling with Major Rathbone in the President's box, but does not identify him. She makes no mention of the person's intrusion in the theatre box; and Baker in his History of the Secret Service, Page 473, quotes her rather completely on that statement.

Q. But neither of these two sources which you have mentioned were the ones you used?

A. No.

Q. You mentioned her first affidavit?

A. That's right; it also is mentioned in Harper's Weekly.

Q. The only authority for the fact that she gave the first affidavit is Dr. Eisenschiml?

A. Yes. And back here we have the same curious re-

mark of Badeau that no one left or entered until
174 about the time of the assassination, which might or
might not refer to the first intrusion.

Q. Have you finished now dealing with Item 22 or Quote 22?

A. Yes.

Q. Now, let's get to Quote 23, which appears at Page 5 of Mr. Eisenschiml's Exhibit C, that says this—(reading):

"But Benn Pitmann's original handwritten transcript of the testimony is still in the National Archives at Washington, containing an important part of Fletcher's story, which was absolutely omitted from the public version.

"In the testimony which failed to reach print, Fletcher told how seated in front of his table, he heard passers-by talking about the assassination, and they were saying that he was a man riding on horse back that shot President Lincoln."

Q. Did you steal that from Dr. Eisenschiml?

A. No, that came from a comparison of Pitmann and Poor. One thing I did not get from the archives is Pitmann's original transcript; I took yours (addressing the plaintiff).

Q. You are referring to Dr. Eisenschiml?

A. Yes. I came across it because in my study of
175 the thing I found Poor's transcript easier to read. I
had both of them there, and it became quite obvious there was more in Poor's than there was in Pitmann's.

Mr. Gertz: You did not actually look at Pitmann in the archives?

The Witness: No, not in the archives.

Q. Did you ever look at Pitmann's?

A. I have Pitmann's here, but I did not look at it; also in "The Great American Myth" at Page 14, it deals with the testimony, too, or at least it brings out Fletcher's additional testimony.

Q. On what page of Poor does this appear?

A. I do not believe I have that—no, I haven't. As a matter of fact, I didn't look that up again. In my rush here I knew I had it—

Q. Can you state whether or not this testimony we are discussing appears in the Philadelphia Inquirer's transcript, if you know?

A. On this particular one, I don't know.

Q. Have you anything further to say with regard to Quote 23?

A. No, —wait a minute, that is Poor, Pages 329 and 30.

Mr. Martineau: Off the record—

176 (Further colloquy off the record.)

Mr. Martineau: Mr. Gertz and Dr. Eisenschiml have very intelligently suggested that instead of my reading verbatim the different quotes, of which there are 66 in Dr. Eisenschiml's Exhibit C to his affidavit, we just identify the affidavit, and I will call attention to the various quotes and ask Mr. Millard to state his historical sources for them, and this, I think, will save a great deal of writing.

Mr. Gertz: Then your reference will be to the number as appears in the first column of Exhibit C?

Mr. Martineau: That's right, the first column of Exhibit C to Dr. Eisenschiml's affidavit, heretofore filed in support of his motion for summary judgment. I think that will shorten this thing up a lot.

Mr. Gertz: All right.

By Mr. Martineau:

Q. Mr. Millard, let me ask you this before we work into this new system—should Quote 23, which you just told us about, be considered in connection and in con-

177 junction with Quotes 24 and 25?

A. It could very well be, yes. There is a portion

of 24 and 25 that I will have to answer you a little differently than the rest, but they are all on the same subject.

Q. Let me ask you this: what is your historical source for Quote 24?

The Witness: May I, before we do that, Mr. Gertz is waiting for page numbers on Poor's 329 and 330, to answer your question there are several. Of course, a part of the testimony, a part of the quote is merely a part of the testimony from both Poor and Benn Pitmann, Poor being more elaborate than Pitmann.

Q. And what are the pages on Poor?

A. 328 and 330.

Q. And what is the page on Pitmann?

A. Also 83 and 84. Now, there is a piece of Dr. Eisenschiml's research which could be in there, which I took from him on examining and rounding out the scene I was trying to set, according to him, Dr. Eisenschiml, the police record showed that John Fletcher had been there some time between 11 o'clock and midnight, and that I had no other source for.

Q. Save Dr. Eisenschiml?

178 A. That's right.

Q. Do you have any other historical sources for Quote 24?

A. On Quote 24, Baker—well, no, that really belongs on 25, Baker's statement, though Baker does quote Fletcher at Pages 529 and 530.

Q. And what does Baker say?

A. The part that I was interested in refers to Quote 25 rather than 24.

Q. So we will take it in turn.

A. All right, no, I have nothing further to add on 24.

Q. Are you prepared to quote the part of Poor at Pages 328 and 330 to which you referred above concerning Fletcher's testimony?

A. I have part of it written down here, the latter part, not all of it.

Q. Will you give us that?

A. Fletcher's testimony is (reading):

"So I went down 10th Street to the police office, I met a detective there by the name of Charlie Stone and called him to one side and asked him if they had picked up any horses of such a description. He told me there were some horses at the General Augur's Headquarters, and
179 asked me who I hired the horses to, and I told him * * *. He then asked me to go along to General Augur's office. We went there together."

I believe those skip marks refer to the part where I couldn't remember Atzerodt's name.

Q. In other words, for greater certainty you refer to Poor at Pages 328 and 330?

A. Yes.

Q. Now, let's come to Quote No. 25; what is your historical source for that?

A. My historical source for that is partly the quotes you just had. Now, I followed that by saying "Now, of course, there will be a swift concentration of pursuit along the road * * * but nothing at all was done."

Q. Pardon me, in that last thing you were referring to your article?

A. Yes, in my article; there is more of it here.

Q. All right.

A. That comes from Baker, Pages 529 and 530 where he says, and I quote: "Fletcher's statement was entirely disregarded. No steps were taken by those in possession of this information, to follow up the clue thus given, until
16 hours afterwards. This delay enabled the assassins
180 to get entirely beyond the reach of those sent in pursuit."

Q. Is there anything in the Philadelphia Inquirer about this that you know of?

A. That would be practically a duplication of Forbes' testimony.

Q. And that covers Quotes 24 and 25?

A. Yes.

Q. Let's now come to Quote 26. Did you lift any of that from Dr. Eisenschiml?

A. Let me see, 26, no, that has been mentioned in other places, but I found it specifically, again I recall it rather, in Gleason's article, "The Conspiracy Against Lincoln," in the Magazine of History for February, 1911, at Page 64. I have it here if you want to hear the whole thing.

Q. Tell us what Gleason says.

A. He tells about rushing to Augur's office, asking to be sent with a cavalry squad to the Surratt place in Maryland to catch Booth; says he was refused because 'They thought I could be of more assistance in Washington * * * sometime towards morning I was allowed to go back to my room.' "

Then it goes on to tell that he went back to the office and found that "The authorities had lost 12 hours, and then decided to do exactly what they had refused me
181 the night before. The identical plan I proposed was now adopted but much valuable time had been lost."

Q. Will you tell us whether you pirated No. 27 from Dr. Eisenschiml, and if not, what is your historical source as to that?

Mr. Gertz: I object to the form of that.

Q. Will you tell us what is your historical source for Quote 27?

A. Yes. Quote 27, one thing is from Dr. Eisenschiml, and that is the number of persons rushing to the headquarters. He states, I believe 17, and I used that figure. At any rate, Tanner, writing in the American Historical Review for 1865, Page 472.—I do not have the quote, he had opinions that a number of persons rushed to police

headquarters. In fact, he says, and I quote: "Various witnesses were brought in who had been in Ford's Theatre * * *. The testimony * * * left no doubt as to the identity of the assassin."

This actually refers to a different question here. The only background here is in "The Great American Myth," Page 192. The statement is made that a number of persons rushed to the police headquarters. The actual number was not given. I took that from Dr. Eisenschiml.

Q. Did Crook mention it?

182 A. That refers to a different part of this question, to Booth's identity.

Q. I understood that is one of the main questions involved in Quote 27.

A. Yes, to Booth's identity, and Crook at Page 596 says "It was * * * generally believed that J. Wilkes Booth was the assassin * * * upon the statements of some of the persons at the theatre that they believed that it was Booth."

Q. Does that cover all of your historical sources, then, for Quote 27?

A. Practically, I believe I have one more thing—

Q. Did you mention "The Great American Myth" on that point?

A. I am looking for that right now. I think there is a statement at Page 184 of "The Great American Myth". He mentioned that there were a large number of people who swore it was not J. Wilkes Booth which is the source of the statement of mine in there.

Q. In Quote 27?

A. Yes.

Q. So that we get this straight, you say that you got all these other facts from these other sources which you just mentioned—

183 A. Yes.

Q. And all that you got from Dr. Eisenschiml and

another authority was the number of persons who went to Richards Headquarters, the number being 17 according to Dr. Eisenschiml, is that right?

A. Yes, that's right.

Q. Now, let's come to Quote 28. Will you state what are your historical sources for that?

A. Well, for example, Townsend in his book "Life, Crime and Capture of John Wilkes Booth"—

Q. When was that published?

A. 1865. At Page 49 he says, quote: "On the Friday night of the murder the department was absolutely paralyzed. The murderer had three good hours for escape."

Q. Is that the end of the quote from him?

A. On that, yes, and Goggeshall—

Q. What is his book?

A. His book is "The Assassination of Lincoln", 1920, Page 44. I do not have a direct quote, but he says "One of Stanton's first dispatches to Major General Dix was sent three hours after the assassination;" in other words, one of the first dispatches, not necessarily military. Now, I have one more quote, if I can go back here, he says, 184 and I quote, this is Goggeshall, I am quoting—I copied his quote.

Q. What page is this?

A. Page 44, he says "One of his (Stanton's) first telegrams was to General Dix, the military commander of New York * * * though written scarcely three hours after the scene in Ford's Theatre."

Now, at that point I think anyone investigating the murder mystery would wonder for himself why a man should be complimented for waiting three hours. I think it is just a certain amount of plain detective curiosity could take over.

Q. Did you have any other sources on Quote 28?

A. No, I don't believe so.

Q. Did you have a book called "The Rebel War Clerk's Diary"?

A. That's right, I realize 28 goes on to the next page, and I was skipping, so I will read the quotation there. This is Volume 2—

Q. What pages?

A. Pages 479 and 480.

Q. Will you tell us what "The Rebel War Clerk's Diary" says, if anything at Pages 479 and 480 on the 185 subject mentioned in your Quote No. 28?

A. "April 17"—I am now quoting: "April 17 I add a few lines to my diary. It was whispered yesterday that President Lincoln had been assassinated. I met General Dave Green in the afternoon who assured me there could be no doubt of it. Still supposing it might be an April hoax, I inquired at the headquarters of General Ord and was told that it was true."

In that respect, that is the end of the quote. To turn to a new quote "Upon going downtown this morning everyone was speaking of the death of Lincoln and the Whig was in mourning."

So there you have the dates when the rumor first hit, and when Richmond Whig published it. Apparently it was known, in other words, by all the military command there, but was not released to the paper until another day, o at least the paper did not get to know about it.

186 Mr. Martineau: It is stipulated between Mr. Gertz and Mr. Martineau—subject to Mr. Gertz's right to call attention to any incorrect statements in the deposition —that the signature of the witness, Mr. Millard, shall be waived for both the direct and the cross-examination.

Mr. Gertz: So stipulated.

(Discussion off the record.)

Mr. Martineau: Mr. Gertz, Mr. Flannery calls my attention to the fact that the original notice which we served on you for the taking of Mr. Millard's deposition here, at this time and place, was sent by us to him and by him filed in the Clerk's office here in the Federal Court and subpoena issued on the witness, Mr. Millard; so that is where the original is.

I believe we can stipulate that that is where it stays.

Mr. Gertz: If you want to file it, you can file a carbon copy.

Mr. Martineau: Thank you very much.

(Discussion off the record.)

Q. Mr. Millard, will you refer to Quote No. 29 and 187 state to us what is your historical source or sources for that statement.

A. Well, my source for that statement is Gobright's "Recollections of Men and Things in Washington", pages 348 and 349, where he says:

"On the night of the 14th of April, I was sitting in my office alone. A hasty step was heard at the entrance of the door, and a gentleman * * * informed me that the President had been assassinated and telling me to come with him * * * I obeyed the summons * * * I then first went to the telegraph office, sent a short special and promised soon to get the particulars * * * We drove to the theatre."

Then a new quote—Well, that is on a different subject.

The other source is the New York Tribune for April 15, 1865. In the paper, I believe about page 4, there is Gobright's original note, original dispatch, followed by one—I don't have the exact quote here, but anyway to the effect that their Washington correspondent "tells us to disregard the previous notice" without telling us whether it is true or not.

Those are not exact words, but that's the gist of it.

188 Q. Pardon me. Before you pass that particular source, do you have that very copy of the New York Tribune among your papers?

A. No; I do not. I got that from the library here.

Q. The New York Public Library?

A. Yes. They have papers dealing with the assassination put in one sheaf for use.

Q. Do you have any other sources for this Quote No. 29?

A. Quote 29 and 30 can be put together, for that matter. In fact, they should be, since they both refer to the dispatches sent by Gobright. I see I have the wording here—

Q. Yes?

A. I didn't think I had it with me, but I do. The wording of the two dispatches, if anyone cares to hear it.

Q. I care to hear it, if you don't mind.

A. All right.

Q. Let me get you straight on this. Do you mean that your historical sources for Quotes 29 and 30 are the same?

A. Yes.

189 Q. Does that state it fairly?

A. Yes.

Q. All right. You have already given us Gobright's article in the New York Tribune for April 15, 1865, have you not?

A. Yes; I have.

Q. Will you come now to your next historical source for Quotes 29 and 30?

A. The dispatch was dated the 14th.

Q. You mean, Gobright's dispatch?

A. Gobright's dispatch; yes.

Q. Go ahead. What is your next historical source?

A. That I believe is all I have on that. I had the addi-

tional statement in Gobright's book, that a man standing by picked up Booth's pistol from the floor. "When I exclaimed to the crowd below that the weapon had been found and placed in my possession * * *", that is a question that came up here about that. Gobright did not find the pistol, as I recall. It was found by a man named Kent.

Q. You mean, according to the historical sources which you have quoted?

190 A. Yes.

Q. Go ahead.

A. This is according to the transcript of the trial, either Poor's or Pitmann's. I do not have the pages here, but I can find them in a moment. A man named Kent.

Q. Will you look at Pitmann, page 82? Do you have Pitmann here?

A. I have it.

Q. See if you can find who found the pistol.

A. I have it here.

Q. Are you referring to Pitmann's book?

A. Pitmann's transcript.

Q. Of the trial?

A. Yes.

Q. What page?

A. Page 82.

Q. What does he say about who found the pistol?

A. The testimony of William T. Kent.

I quote: "About three minutes after the President was shot I went into his box. There were two other persons there and a surgeon who asked me for a knife to cut open the President's clothes. On leaving the
191 theatre I missed my night key, and, thinking I had dropped it in pulling out my knife, I hurried back, and in searching around the floor of the box I knocked my foot against a pistol which I picked up, and holding it up, I cried out, 'I have found the pistol.' I gave it up to

Mr. Gobright, the agent of the Associated Press. The next morning I went around to the police station and identified it there."

(Discussion off the record.)

Q. Have you covered everything about Quote No. 30, now?

A. I believe I have.

Q. Concerning the dispatches in the New York Tribune for April 15, did you cover that?

A. You have one page to look at, and I have several here. I will try to catch up with you.

Q. All right.

A. Yes. I think I have covered that.

Q. Did the New York Tribune say anything about what its Washington agent had said about the dispatches concerning the President?

A. Well, it just said, "Our Washington agent orders the dispatch 'stopped'." The "stopped" there is in 192 single quotes. Nothing is said about the truth or falsity of the dispatch.

Q. I see.

A. That was their only comment. Then, later, Gobright published a book of reminiscences, which I have mentioned earlier here, in which he made no mention of the reason for that, no excuse for it.

That was rather a curious thing, a very bewildering thing, something that should arouse anyone's curiosity immediately.

Q. Will you come, now, Mr. Millard, to Quote No. 31 and state to us what are your historical sources for the statements in the Quote.

A. Chiefly Lafayette Baker, for one, and "The Great American Myth", page 225. Baker is page 485.

Q. Do you have the quote from Baker there, Mr. Millard?

A. I have the quote from Baker here. He says:

"Within fifteen minutes after the murder, the wires were severed entirely around the City excepting only a secret wire for Government uses which leads to Old Point. I am told that by this wire the Government reached the fortifications around Washington, first telegraphing
193 all the way to Old Point and then back to outlying forts."

Q. That is the end of the quote from Baker?

A. Yes.

Q. Do you have the quote from "The Great American Myth"?

A. I have no quote from "The Great American Myth".

Q. Is that all you have to say about Quote No. 31, then?

A. Let me see whether it is included here. "The Great American Myth", I remember, quoted Eckert's response under questioning as to his interest in the thing or whether anything was done about it. I do not have the wording here. I didn't take that down.

Q. You say "Eckert's response". Do you refer to Eckert's testimony at the trial?

A. Eckert's testimony. Not at the trial. At this later investigation.

Q. I see. As to who was getting the reward; is that it?

A. No. This was an investigation into some of the mysteries of the assassination, I think attendant on the impeachment proceedings against Johnson, if I am not too hazy on it.

194 Q. Let us come to Quote No. 32. Will you tell us what are the historical sources for the statements in your Quote No. 32.

A. Let's see. 32. Well, Lloyd Lewis, in his book, "Myths After Lincoln", pages 57 and 58, brings up the

fact that the attention was thrown to the north, and I can quote Stanton—

Q. Are you quoting now?

A. Stanton: "(Sent to telegraphers to notify the nation, warning troops to watch the Canadian border for escaping conspirators.)"

Now, in the official records, Series I, Volume 46, on page 572, you have the first telegram—you have what I believe is the first telegram recorded in the attempt to stop the assassins or find them.

This went to Colonel Thompson, commanding at Darnestown, and I quote:

"Colonel, an attempt has been made to assassinate President Lincoln and Secretary Seward. The assassins are supposed to have escaped toward Maryland. Send all your available people at once to scout near Washington and arrest all suspicious persons. Report. By order of General Augur."

195 Q. Does that complete your comments on Quote No. 32?

A. Yes. That does.

Q. Let us come now to Quote No. 33, and tell us what are your historical sources for that.

A. Well, this is one we have covered once before, that Booth was supposed to have shouted to Lloyd, "I'm pretty certain", and so on.

Q. I don't believe we have covered this one. I believe it is covered later on.

A. This is duplicated.

Q. This is the first time around.

A. Of course, the statement itself, Booth's shout, is covered by both Pitmann and Poor.

Q. You mean, Booth's shout as testified to by Lloyd?

A. Yes. So that much, and by not mentioning any other cabinet member, I said he implied that no plot against any others existed—

Q. That was your inference, was it?

A. Yes; it was an inference encouraged by Dr. Eisenschiml's interest in it, I am afraid. Clara Laughlin, in her "Death of Lincoln", on page 122, mentions Lloyd's
196 statement; and Townsend, on page 47, quotes it. Poor's quotation is on page 119, if you want it.

Q. You mean, all to the effect—

A. All quoting Lloyd's testimony on Booth.

Q. I see.

A. But the inference I drew probably—Now, it's a little hard to say. I am probably admitting something that I couldn't swear to when I say I probably got the inference, because I was absorbing everything I could get my hands on from all sources, as far as I could, reading books after book on the subject, and then finally sitting down to write, and it is probably reasonable to suppose that that inference was stimulated or stirred by some of your findings, Doctor.

Mr. Gertz: Referring to Dr. Eisenschiml.

Q. In other words, Mr. Millard, you referred to the parallel Quote No. 33 from Dr. Eisenschiml in the same exhibit?

A. Yes.

Q. Where he makes the same inference that you make; is that right?

A. Yes. The other part is covered in some places—in so many places that that is—

197 Q. In other words, so we can leave that statement there, is this it: that all these other authorities whom you have mentioned, merely quote the testimony of Lloyd, who in turn quotes the alleged shout of Booth as to whom they had or had not assassinated, and the rest of it is an inference first drawn by Dr. Eisenschiml and then drawn by yourself in that article, that therefore they had not intended to assassinate anyone else? Is that right?

A. It's one of those things, that once it comes to you it sounds so logical that you think you probably thought of it yourself, but I hesitate to say that.

Q. Let us get on now to Quote No. 34. What are your historical sources for that quote? That is more about this fellow, Parker.

A. 34. That is taken directly—is found directly that way in both "The Great American Myth" and in Sandburg, page 337. He tells in some detail—

Mr. Gertz: Sandburg, in what volume?

The Witness: Volume IV.

Mr. Gertz: What page?

The Witness: 337.

A. (Continuing.) He tells in great detail about
198 Parker's picking up Lizzie Williams, a prostitute, and bringing her in, and how she was discharged immediately for want of a charge against her.

It is covered in great detail there. That covers both 34 and 34-A, by the way, because he also, and the other, "The Great American Myth", both, continue then up to the point of not—let us say not bringing a parallel between Parker's being fired and Stanton's being out.

Now, there, again, perhaps an inference can be drawn from you.

Mr. Gertz: Referring now to Dr. Eisenschiml.

The Witness: Yes.

A. (Continuing.) Or perhaps an obvious thing that I would think of myself, since I was consumed with curiosity in attempting to literally write a murder mystery, and when you write a murder mystery, you try to think of all the puzzling and bewildering things; you interpret everything from that view, in that light. So it is something that I can't answer, really, on that.

Q. So we can leave these two quotes, 34 and 34-A, is it your testimony that your historical authority for the

facts stated in those quotes is Sandberg, Volume IV, page 337, which you referred to? And did you also refer to "The Great American Myth"?

A. I mentioned it; yes.

Q. But you don't know the page?

A. I don't know the page.

Q. All right.

A. By the time I got to that last, I was in an awful rush, and I did a sloppy job.

Q. Quote No. 35. Will you tell us what your historical sources for that are.

A. My sources for the quotation itself within the quotes is Dr. Eisenschiml. The facts are stated in a number of places, but not with direct quotations.

Q. Will you—

A. For instance, Oldroyd, on pages 101 to 104, gives the testimony of Thomas A. Jones.

Q. Do you have a quote on that?

A. I have a quote. I am wondering if you need the whole thing. I might as well give it.

"My name is Thomas A. Jones, and I am the man who cared for and fed Booth and Herold while they were hiding after committing the awful deed. On Easter Sunday morning a boy * * * told me Samuel Cox, my foster brother, wanted me to come over to his place * * * Cox said there were two men * * * and I think one was Booth. I visited them daily, giving them food and newspapers and any information that I could for six days."

Townsend, on page 58, also tells of Cox's harboring the fugitives from Sunday to Thursday, and includes the story of the Negro, Swan, who said he saw the fugitives drink and eat heartily.

Coggershall, on pages 59 to 63, tells substantially the same account, and Laughlin, on page 128, also gives Jones' account.

So the facts were known. The exact wording I have not seen anywhere else, I don't believe, but in Dr. Eisenschiml's book, the exact wording in his journal.

Q. Let me get this straight, now. In Dr. Eisenschiml's Quote No. 35, on the same page of the exhibit, he says this: "In a diary (O'Beirne wrote) Samuel Cox * * * his mill servant, states that Cox had been cooking provisions lately and carrying it to persons down in the swamp * * *" That close O'Beirne came to getting his man.

If I understand you then, Mr. Millard, you say that the only part you got from Dr. Eisenschiml was the
201 exact quote from the purported O'Beirne diary?

A. Yes.

Q. Which only Dr. Eisenschiml has?

A. Yes; the part within the quotes.

Q. And that is the only part you took from Dr. Eisenschiml?

A. Yes.

Q. The facts you got from other sources?

A. Yes. The facts were laid out by almost everyone who wrote on the assassination.

Q. Do you have anything more to say about Quote No. 35, then, before we pass it?

A. No more.

Q. Will you turn to Quote No. 36 and tell us what your historical sources for the statements therein contained are.

A. Yes. The way to start, I guess, is where I started. Where I got it first was Lafayette Baker, page 490, where he says, "A telegraph station was established * * * by an invaluable man to the expedition, Captain Beckwith, General Grant's chief cipher operator, who tapped the Point Lookout wire and placed the War Department within a moment's reach of the theater of events."

202 Then—I don't have the additional quote, but Baker goes on—I can find it in the book there in a moment.

Baker then goes on and tells how they notified the War Department, and word was immediately flashed back for O'Beirne to drop the chase, that someone else would take over, and Baker made his immortal statement that O'Beirne went back, contented and happy.

But I didn't copy down the rest of that, and I intended to. If you have it here, I can find it.

Q. It is in Baker's book?

A. Yes.

Q. Will you go on and tell us what your next historical source is?

A. Well, Bates in his "Book of the Telegraph" mentions the setting up of the office on Chapell Point.

Q. What page?

A. 373.

Q. What is the next one?

A. The official records on page 973—I'm sorry. 937.

Q. Which volume?

A. That's the same Series I, Volume 46, on page 937. They have this telegram from Beckwith to Eckert:

203 "April 24th. Have just met Major O'Beirne whose force has arrested Dr. Mudd and Thompson * * * I will continue with Major O'Beirne, in whom I have very great confidence. We propose first to * * * scour swamp and country * * * and if unsuccessful and additional evidence will justify it we then propose to cross with force into Virginia and follow * * * as long as there is any hope."

Townsend—

Q. What page?

A. Page 56. —says that O'Beirne returned to Chapell Point "whence he telegraphed * * * and asked permission to pursue * * *."

"This the department refused."

Oldroyd, on page 66, also remarked on the refusal of the War Department to let O'Beirne pursue, and adds: "We

can but think that after getting so close to them he ought to have followed the trail and captured them without waiting further orders. The party returned on the boat to Washington."

—which I think covers that pretty well.

Q. Coming to Quote No. 37, will you tell us what your historical background or authority for those statements is?

204 A. Yes. That comes from a book by a lady spy, Madame Velasquez—"The Story of the Civil War", pages 516 and 517.

Q. What did she say there?

A. She says:

"Baker's friend here said, 'I am glad that they got Booth.' At this remark I scanned Baker's countenance closely. He smiled and said, 'So am I. I intended to have his body dead or alive, or a mighty good substitute for it, for no common criminal is worth the reward.'"

Now, for that I have to thank Dr. Eisenschiml, who put me on the track of that book when I was researching Baker. He recommended it, and I located it. I have a feeling I got it from Chicago, got the use of it in Chicago, but, if not, it was in the Library of Congress. I can't remember. But I have a feeling Paul Engel has that in his office.

Q. In Chicago?

A. In Chicago, in the Chicago Historical Society. But my memory is hazy on just which of those places I got it. It might have been out in Newbury, but I'm not sure.

Q. Do you know whether the Velasquez book is
205 available in the New York Historical Society?

A. Yes. They have it there.

Q. Is your memory clear that you did actually read this book by Miss Velasquez?

A. Yes; it is clear, because I got interested and wanted to do a piece on it for True Magazine, and they finally,

after some discussion, decided against it, because she was a woman, and they didn't think a man's magazine would go for a story about a woman.

But I got interested at the time, aside from taking this part to use in my Baker piece, the original.

Mr. Gertz: I move to strike that out.

Q. When you say you are indebted to Dr. Eisenschiml for being put on the track of this book by Miss Velasquez, do you mean that you were put on the track when you physically talked to Dr. Eisenschiml in Chicago, on that occasion you mentioned when you were researching for the book by Baker?

A. Yes. Dr. Parker said that Dr. Eisenschiml knew more about the book than anyone else, and that was one of the suggestions he made, for which I am very grateful.

Q. I think there was some comment made concerning these italics. Will you look at the italics in your quote 206 from Baker in your Quote No. 37 and Dr. Eisenschiml's Quote No. 37. I think some point has been made about that.

A. Yes. I put mine on, not because anyone else did, but because I wanted to emphasize what I thought was the only important part of the statement. It would be quite natural that the man in charge of pursuit would want to get his body.

Q. Whose body?

A. Booth's body.

Q. I see. Go ahead.

A. But then to add: "* * * or a mighty good substitute for it"—that was the only point in quoting it. And I put the emphasis where I thought it belonged. I think it pointed up and sharpened the impression I wanted to make there when I did quote it.

Q. In other words, you wanted to emphasize the fact that this fellow, Baker, said he was going to get the body or possibly a substitute for Booth's body? Is that it?

A. Yes. I am quite sure there were no italics in the original book, but I put them there for the very express purpose of emphasizing points I wanted to make.

207 Q. Which is what you have stated.

A. Yes.

Q. Will you come to your Quote No. 38 and tell us what your historical sources for that are.

A. Well, one of these was Clara Laughlin.

Q. What page?

A. Pages 165 and 166. She says:

"On what information Arnold and O'Loughlin were arrested so promptly the records do not tell us, but John Surriatt * * * said in his Rockville lecture of December 8, 1870, that the abduction plot was known to the Government detectives, who quite naturally jumped to the conclusion that the men involved in it were those implicated in the President's murder."

Now, I think—I have not checked there, but my memory tells me that Margaret Leech in her "Reveille in Washington" also refers to that same thing and questions it, but I didn't stop to look that up.

Q. In other words, what you mean is that you did not use Margaret Leech as an authority when you wrote this story?

A. I don't think I did.

Q. —in controversy there?

208 A. I don't think so. I think I used Clara Laughlin there, one of what I called the "base" books on this thing.

Q. The Clara Laughlin book?

A. Yes.

Q. All right. Will you come to Quote No. 39 and tell us what your historical authority is for that.

A. Yes. Those are diaries.

Q. Diaries?

A. Published diaries. Orville Browning's diary. Volume II, 1933. It was published at page 37.

Q. Any other?

A. "The findings of the Military Commission were approved today by the President, and Atzerot"—it's spelled here—"Herold and Payne were directed to be hung tomorrow. The others are directed to go to the penitentiary. This Commission was without authority, and the proceedings void. The execution of these persons will be murder."

Now, in Bates' diary—

Q. Where is that to be found?

A. That's in the annual report of the American Historical Society, page 498. He says—

209 Q. Pardon me. You say, annual report of the American Historical Society.

A. Yes.

Q. For what year?

A. 1930.

Q. Page 498?

A. Yes. He quotes Speed's pamphlet. He says:

"This is the most extraordinary document I ever read under the name of a law opinion."

So those are the two sources for that—both original quotes.

Q. Will you come to Quote No. 40 and tell us what are your historical sources for that statement.

A. Yes. Part of it—part of the description there is from—

Q. The description of the Tavern—

A. Yes. From Baker; some is from Sandburg, but most of it came from a piece—and for some reason I do not have it with me. I brought it up with my other stuff. It is a copy of the Lincoln Herald that has the story of Bullard and a little group that covered Booth's flight and covered

all the stops and noted their present condition, of the
210-211 way they looked then, and even had some photographs.

Q. You mean by "then", at the time of the murder?

A. Yes.

Q. And "now" meaning whenever they retraced it: is that right?

A. Yes. I have that copy, but not with me. I can't tell you the name of the—except it was Larston Bullard and a group who made the trip.

Q. Could you send that up to us so we can use it at the trial?

A. Yes. I have it home.

Q. All right. Let us come to Quote No. 41. Tell us what your historical background for that quote is.

A. Yes. I think that came from the gentleman who called himself Private Miles O'Reilly.

Q. Did he write a book?

A. He wrote a book called "Baked Meats for the Funeral"—I believe is the title.

Q. What was his real name?

A. "Baked Meats of the Funeral".

Q. What was his real name?

A. He was Major Haley or Hanley—something with an "H". But he wrote as Private Miles O'Reilly.

212 Q. What page of his book?

A. Page 110. Published in 1866.

Q. What does he say?

A. He says:

"* * * he came over one evening * * * to protest * * * against a small detachment of cavalry which had been detailed without his request * * *"

"The burden of his complaint was that he and Mrs. Lincoln couldn't hear themselves talk for the clatter * * *"

Q. By that "he", does that refer to Mr. Lincoln?

A. Yes.

Q. Do you know whether this is mentioned in Carl Sandburg?

A. I have a feeling that it is.

Q. But you don't know?

A. I didn't check that.

Q. Let us get on to Quote No. 42 and tell us what your historical authority for that is.

A. Quote No. 42. Oh. That's Sandburg.

Q. What page?

A. Page 329, Volume IV. He makes that statement.

Q. About the muscularity of Payne?

A. He says—Yes. He says that Payne's job was to 213 match muscles, or something to that effect, with the still powerful Lincoln.

Q. How about Quote No. 43? What is your historical authority for that statement?

A. Baker—I believe this is a quote we have covered once before. Lafayette Baker, pages 529 and 530.

Q. What does he say?

A. He says:

"Fletcher's statement was entirely disregarded. No steps were taken by those in possession of this information to follow up the clue thus given until sixteen hours afterwards. This delay enabled the assassins to get entirely beyond the reach of those sent in pursuit."

Q. Did you draw any inference there, in addition to that statement from Baker? Is there any inference of yours in Quote No. 43?

A. No. I say that nothing at all was done. In other words, they didn't do anything. It is an incomplete quote. I don't remember how I finished the sentence now.

Q. Let us come to Quote No. 44. Tell us what your authority for that statement is.

A. Well, my first authority for that statement is com-

plete common sense, that the head of the Metropolitan
214 Police Department and the head of the military would naturally be in constant touch with Stanton.

Q. You mean, when the President of the United States was attacked?

A. Yes. —was assassinated, and they were out theoretically trying to find his assassins. Sandburg, I believe, implies as much without saying it directly, and I don't have the page number here, but it is where he is telling all the voluminous things that Stanton was doing at the Peterson house immediately after Lincoln's body was moved over there and he had pushed Mrs. Lincoln out of the room. He implies it, and I think Oldroyd—Yes. Oldroyd on page 66—

Q. What does he say?

A. Well, it isn't a direct answer here. It is part of another thing, but I will quote it.

"Major A. C. Richards, Superintendent of the Metropolitan Police, who was in Ford's Theatre when the President was shot, being satisfied that Booth was the perpetrator of the deed and had taken flight across the Navy Yard Bridge, was ready to pursue the assassins as soon as the Government would furnish horses, but, owing to red tape, to which our Government is so prone,
215 the posse could not leave Washington until twelve hours after the shooting."

Q. Does Baker say anything about this that you know about?

A. It seems to me he does, but I don't have a quotation on it.

Q. All right. Let us come to Quote No. 45. What is your authority for that statement?

A. Oh, a million of them. Practically everybody who ever mentioned the Civil War detailed the route of spies and couriers, and it is found in books. Baker, for example,

on page 480 goes into detail. DeWitt goes into detail on page 24.

Q. Is that David M. DeWitt?

A. Yes.

Q. What is his book?

A. Is it "The Assassination of Lincoln"? Wait a minute. I can't think now. The exact title is "The Assassination of Abraham Lincoln and its Expiation".

Q. It was published when?

A. 1909. There may have been an earlier publication of it, too.

Q. What pages? On what pages does Mr. DeWitt 216 cover this subject?

A. Let's see. Page 24.

Q. Does he cover it on any other page? Is there anything about Herold?

A. Page 60, yes. He says:

"The emergence of the useful rider of the underground route in connection with the arch assassin seemed to furnish a solution of the problem * * * The perpetrator of the butchery at Seward Mansion * * * had left behind him a well-marked trail."

But on page 24, he says, speaking of John Surriatt:

"Knowledge of the territory over which the intended captive must pass, with its relay stations, the ferries across the Potomac, the haunts and habits of the underground route."

Q. Does Coggershall say anything about this?

A. Yes.

Q. What page?

A. Page 14.

Q. On the underground route?

A. Yes.

Q. What about T. H. Harris?

Mr. Gertz: I am objecting to all these questions.

217 Mr. Martineau: All right. Strike out my question about T. H. Harris, and I will ask another one.

Q. Are there any others?

A. Yes. There is my wall paper here, which is the New York Evening Post for February 21st, 1862, and here is one full newspaper column.

Q. On what page?

A. Page 4. The title is "The Contraband Mail. How the rebels get their letters and papers."

Q. This was during the Civil War?

A. Yes. Much earlier. It says:

"Everyone knows that Washington is full of rebels and rebel spmpathizers who have managed, ever since hostilities were begun, to keep their friends across the Potomac duly informed of movements of our troops. But, as everybody does not know how these communications are kept up between the north and the south, the information gathered in active service during the summer and winter may be generally interesting to the public."

And there follows a complete description of the water route, the wagon route, the ocean route and other

218 means of conveyance.

So you have the full picture of the underground that was in operation at that time in this newspaper.

Q. You mentioned a book by Harris a little while ago, page 26.

A. Yes.

Q. What does he say about that underground route there?

A. Harris says:

"This was on the line of a regular underground mail route between Washington and Richmond."

• • • • •

219 Q. Meanwhile, you can say, Mr. Millard, whether or not your authorities in support of your Quote No. 46 are the same as your authorities in support of your Quote No. 33.

A. Yes; they are.

Q. Let us come to Quote No. 47. What is your authority for that statement?

A. I wish I knew. I can tell you it was not Dr. Eisenschiml, but I can't for the life of me recall, nor can I come across it in the limited time I have had. I have a blank card here and a headache trying to remember. I can almost visualize the quote on it, but I can't think of the book. I don't have it. I'm stuck.

Q. You do admit seeing this statement in Dr. Eisenschiml's work?

A. Oh, yes. I saw it there, but I'm positive, very positive, that this and No. 48, on which I am quite equally vague now—

Q. You say "this and No. 48", which is the next one?

220 A. Yes. —are two on which I am vague, and I think I got them from the same source. I'm just hazy.

Q. Are you still checking the source?

(Discussion off the record.)

Q. To get it straightened out, then, we can agree that you do admit reading what Dr. Eisenschiml says in his Quote No. 48?

A. Yes. I will—

Q. You feel that you did check the source, and you have another source, too, which you are still checking; is that right?

A. Yes. And in a few days I will find it before the matter comes too far along. I'll have it, but I don't have it now. I was working under pressure at the time.

Q. What is your statement with regard to this Quote No. 48?

A. Exactly the same. I'm blank there. But I can recall the quote I used was not—it wasn't like the way you stated it here, that I was using two men on crutches together to veil my source. My original source—

Q. When you say "you", you mean Dr. Eisenschiml; is that right?

A. Yes.

221 Q. Go ahead.

A. Or I was looking at Mr. Gertz. I think it probably was his method of phrasing, at least. I recall, and I will be in a position to prove it here within a few days, that there was a quote that there were two separate pairs, one with crutches and one without, moving through that country at the same time, and that O'Beirne followed one of them; not two men on crutches together, but two separate pairs, and that one of them disappeared into the swamp. They finally lost the crutch marks. And I just can't think where I got it, but I can see that thing in my mind, and I'll find it. I'll find it in a few days, but right now I'm blank.

Q. Does it refresh your recollection to call your attention to Dr. Eisenschiml's authority for that statement?

A. He cites the O'Beirne papers, which he alone has, and the War Department Archives.

Q. Did you see that in the War Department Archives?

A. No; I didn't. I think Baker mentions this part of this, but he's not the source of the two men. It's the two men that bother me, the two pairs.

222 Q. Shall we leave it that you are still checking your sources for 47 and 48?

A. Yes. Sooner or later I'll find where I read it. Two separate pairs.

Q. Let us come to your Quote No. 49. Will you tell us what your authority for that statement is.

A. Well, that was just a fact. Baker, of course, on pages 535 and 536 talks about the three soldiers. The testimony of Jett is in Pitmann on page 90. It's also in Poor, but I don't have the page here.

Q. Go ahead.

A. There is an article by Dougherty on the pursuit and death of John Wilkes Booth, which appears in the Century Magazine for January 1890.

Q. What page?

A. 446. —in which he tells the story of the three soldiers giving their aid to Booth and tells it from their side of the story, and he says:

"After the trial I was sent to Johnson's Isle * * * but after a few days * * * was returned to Washington and, after taking the oath of allegiance I was released."

He also in there tells that Jett—

Q. That was the end of the quote, after the word 223 "released"?

A. Yes.

Q. Go ahead.

A. Then he tells how Jett was made an unwilling witness for the prosecution during the trial. The rest of it is merely facing the fact that here were three men who probably did more than anyone else to help Booth escape, and yet they were not brought to trial at all, and one of them was even brought in by the Government. It is just so very obvious—

Q. You mean, the rest of it is your inference that here were the men who did—

A. It is mine and Dr. Eisenschiml's. I fail to see how anyone reading that could draw the same inference—could

fail to draw it, rather. This fact of the very curious situation. So startling.

Q. From the fact that they were never tried you and Dr. Eisenschiml draw some very startling facts?

A. Yes.

Q. Shall we leave it that if one didn't draw that inference he ought to draw it?

A. Yes. It seems so obvious.

Q. All right. Let us come to Quote No. 50. What
224 is your authority for that?

A. My marks here say that 50 and 51 logically belong together and could logically be answered as one.

Q. Then what is your authority for 50 and 51, treated together?

A. I got under the business—my first was in Baker's testimony. Wait a minute. Let me see if I can—

Q. Here the question was how many doors were in the barn.

A. Yes. That's the problem. I'm trying to organize myself here. Baker, on page 498, mentions only one door, but—

Q. What does he say about the door?

A. I don't have the quote on that here. If you like, I can pick it up over here and read it in a moment. I'll tell you what it is. Of course, the obvious thing, the answer is in Garrett's article in the Confederate Veteran for April 1921.

Q. That is the article you referred to that is quoted in Dr. Eisenschiml's quote No. 50, isn't it?

A. Yes; I think that is.

Q. In other words, give us the authorities that deal with how many doors there were. Do Ruggles and
225 Dougherty say anything about it?

A. They speak only of the door of the barn which was padlocked.

Q. What page?

A. That was page 448.

Q. They say "the door which was padlocked"?

A. Yes.

Q. Baker—you quoted him?

A. Oh, I know now. I'm trying to get this back in my mind so I can remember what I was thinking when I wrote it now. In the Congressional Globe for July 26, 1866.

Q. What are they reporting?

A. There is a quotation. That was in connection with the allocation of the award money.

Q. Was there some kind of an investigation going on about that?

A. Well, yes. There was considerable investigation as to who of this crowd, Baker and Conger and the rest of them, was entitled—and Corbett—and entitled to what share of the reward, and there was something to do with the door. I don't have my quote down here.

Q. But you do remember reading that part of the Congressional Globe?

226 A. Yes.

Q. All right. Go ahead.

A. And there is another—I know now what Baker says. He mentions on page 536, I believe—

Q. This is another mention of it, isn't it?

A. Another mention, yes.

Q. What does he say?

A. On 498 he merely says something about the door, but in this other, in 536, I know what it is— He says "that door which faced the house", which implies that there must have been more than one door. He is referring—he says,

"the door which faced the wing of the house." I believe those were his words.

Q. Is that the one at 498 or 536? Do you have the book here? Maybe we can settle this easily. Do you have it here?

A. I'll have to check it. Either I'm getting tired or I've missed the boat here.

(Discussion off the record.)

Q. What does Baker say on page 498?

A. Baker on 498. He's referring to the tobacco barn where Booth was finally found. He says:

"It lay a hundred yards from the house, the front
227 barn door facing the west gable. It was an old and spacious structure with floors only a trifle above the ground level."

Q. What does he say at page 536, if anything?

A. At 536 he says:

"The barn, as it was called, was in fact an old tobacco house, perhaps sixty feet square, weather-boarded, with large doors in the middle of the front side, and in one of which was a smaller door—a barn, a shed with other buildings, were near this building."

—which is again not conclusive. The only conclusive thing on it is Garrett's later story, which was backed up by his brother, that there were doors on all sides.

Q. Then, to sum the matter up, you don't have the Congressional Globe here, which you feel said something about the door, but you don't remember what?

A. Yes. I think that was Lieutenant Baker's testimony there. Wait a minute. Maybe I have that in the back somewhere. I have taken it and written it out somewhere. No. I don't have it. I may run across it somewhere, though.

Q. Let's see if I can sum the thing up. In all these authorities which you have before you now, it is not

228-229 stated how many doors there were in this barn; is that right?

A. That's right.

Q. Dr. Eisenschiml in his Quote 50 refers to this article by William Garrett, where it is stated that there were double doors on all four sides. You say the same thing in your article and say that the authority for it is William Garrett, and his brother; is that right?

A. Right.

Q. Go ahead.

A. I have another inferential authority on it, but that is the direct one.

Q. In other words, the only question seems to be where you obtained the information that the barn had four doors and not just X doors or X number of doors; is that right?

A. Yes. I had some correspondence with the man who knew the Garretts and spent considerable time in Port Tobacco, and the one question that he couldn't answer was how many doors that had. That's one thing he had never thought to ask. And he had pumped these people up one side and down the other, the eye-witnesses to this thing, and that is one question he never thought to ask.

230 Q. Incidentally, while I was questioning you about Quote No. 50, did we take Quote 50 and 51 together?

A. Yes. That was the intent. It was understood that they belonged together.

Q. So your authority for Quote 50 is the same as your authority for Quote 51?

A. Yes.

Q. All right. Let us come to Quote No. 52. What is your authority for that?

A. Again I fall back on common sense. Would a man be surprised at hearing his own name spoken? There were so many ridiculous things added to the reports, and that,

I think, was one of them, that Booth should look surprised. It's possible, even probable, that I was stimulated to think that, because Dr. Eisenschiml thought the same thing, but if I did, it was subconscious; but, as I have said before, I was hunting for anything that looked screwy, so that I could build up mysterious things in these questions to be answered. I was trying to write that kind of a piece, and so I was trying to find the mystery in anything.

Q. Does Coggershall have the facts about any of this at all?

231 A. Which is this?

Q. What was said when Booth was called upon to surrender.

A. Well, yes. He quotes:

"For whom do you take me?" And the answer: "It doesn't make any difference. Come out."

Q. Who does he say said, "For whom do you take me?"

A. Booth said that.

Q. Does he say who answered? Somebody in the—

A. I believe it was Baker who answered.

Q. And when Baker answered, he said, "It doesn't make any difference. Come out"?

A. Yes. I'm not sure if it was Baker or Conger.

Q. In other words, that is the historical fact, what Coggershall mentions there, and then you draw an inference; you ask the question, "Why should a dying man be surprised at hearing his own name spoken?" And Dr. Eisenschiml in effect asks the same question as you do, doesn't he?

A. Yes.

Q. Let us get down to No. 53.

A. That is again a repetition.

232 Q. Of what number?

Mr. Gertz: Let us get the number.

Q. (Continuing.) Is that the same thing again?

A. This is the Velasquez book again. I will see if I can find it here.

(Discussion off the record.)

Mr. Martineau: Is it stipulated, then, Mr. Gertz, that Quote No. 53 in Dr. Eisenschiml's Exhibit C is a repetition of Quote No. 37?

Mr. Gertz: Yes.

Mr. Martineau: I will ask Mr. Millard.

Q. Is your historical authority for Quote No. 53 the same as your historical authority for Quote No. 37?

A. Yes.

Q. And do the remarks you made in connection with Quote 37 apply also to 53?

A. Yes.

Q. All right. Let us get on to Quote No. 54. What is your authority for that, for your Quote No. 54?

A. Well, a direct authority which I ran on quickly and did a lazy man's job of using is Baker again, page 509, where he says:

"Aiken and Clampitt are both here. They walk impatiently up and down the room whispering a word to each other as to the prospects of Mrs. Surriatt's being reprieved * * * which Aiken confidently tells us has been granted by Justice Wylie and from which he anticipates favorable results. * * * It was the last straw to which, like drowning men, they clutched as if it was to rescue their client from immanent peril."

Q. It was Baker that you relied upon?

A. Well, it's Baker I fell back again on, but originally I relied on the daily newspapers and on a number of scattered—it was generally known and talked all over Washington. The chances are that I could find it there in Harper's Weekly. It was almost promised by everybody

without being put in so many words that this was all a bluff and that at the last minute she would be reprieved, and I believe—I can't give you the source, but I am quite sure that there are quotations saying that her daughter was given that hope very directly.

Q. In other words, your present feeling, then, is that it was mentioned by all writers on the subject very prominently and by all contemporaneous newspapers; is that right?

A. As I remember looking back—and it was a heck
234 of a long time ago, that in sitting there, going over the daily papers, day after day and trying to feel that I was there at the time and trying to absorb it, that I gathered the impression that everybody expected it; the papers expected it, and it was generally talked about.

Now, I'm relying on very ancient and very creaky memory, so I wouldn't want to be pinned down; but Baker has said that fairly closely.

Q. All right. Item No. 55 or Quote No. 55. Will you tell us what your authority for that statement is?

A. Well, Samuel Arnold, in "The Lincoln Plot", which ran in the New York Sun, December 8 to 20, 1902, where he says:

"Less than a month had passed away before he"—and I insert Colonel Baker—"had unearthed another conspiracy which was organizing to rescue our imprisoned bodies."

He also says, and I quote:

"Dr. Samuel Mudd * * * made an attempt to escape * * * Then each of us was placed within a dungeon and shackles were placed around our ankles."

And in Harper's Weekly I not only have the reports of that but I have an artist's sketch of Mudd hiding on
235 the beat, and they're pulling him out.

But back to Baker's stuff, I have a record of a letter which he wrote on August 17, 1865, Baker to the Honorable Eckert, Acting Assistant Secretary of War:

"I have important papers. I think the Commanding Officer of Dry Tortugas should be put on guard against an attempt to rescue the State prisoners * * * I have all the facts from a reliable source."

As a result of that, Townsend, who was Assistant Adjutant General, notified Colonel Hamilton, who was the Commander down there in Dry Tortugas:

"You will place the four prisoners * * * under sufficient restraints and within such limits * * * as shall make abortive any attempt as escape or rescue."

Q. Are those last two documents you mentioned official records of the War Department?

A. Yes. They are official records, and I can't remember where I got them.

Q. What is Quote No. 56? What is your authority for that?

A. My authority for that is Mr. Oldroyd.

Q. What page?

A. Page 227: "On September 27, A. Wilding, 236 Vice Consul at Liverpool cabled * * * Seward * * * to the effect that John H. Surriatt was either in Liverpool or expected."

"He then cabled on the 30th that Surriatt had arrived * * * on the 25th."

Then, on page 228, he says,

"Surriatt being in Liverpool on the 26th, according to the evidence given by the persons who accompanied him from Canada and sworn to before a Justice of the Peace * * * ought to have been in my opinion sufficient grounds for his arrest but it was not made. On October 13th, W. Hunter, Acting Secretary of State * * * cabled the Vice Consul at Liverpool, 'I have to inform you that upon

consultation with the Secretary of War and Judge Advocate General it is thought advisable that no action be taken in respect to the arrest of the supposed John Surriatt at present."

Q. Another authority? Do you have any other authorities?

A. Harris, pages 223 and 224. He tells the same story, and how he then informed the Government in Washington and was told that the Government was not going to prosecute Surriatt, that it hadn't anything against him.

Q. What about Quote No. 57? What is your authority for that?

237 A. I think I have one thing to add.

Q. To Quote 56?

A. To 56. A book called "The Unwritten History of the Assassination of Abraham Lincoln" by Richard Mitchell Smoot, published in 1908, is particularly rich in Surriatt data. Apparently he had a great deal of interest in the Surriatt case, and while I didn't take page quotations from him, he probably covered everything that has ever been written up to a very fine point on Surriatt.

(Discussion off the record.)

Q. Now we are on Quote No. 57, that piece by Albert Riddle.

A. That has one source, I guess, only one. Gideon Welles' diary.

Q. What volume?

A. Volume III, page 170.

Q. What does he say?

A. A paper from Riddle disclosed the fact that R., meaning Riddle, had been employed by Seward to hunt up or manufacture testimony against Surriatt.

Q. Are there any other sources that you know about for that Quote 57?

A. No. That I believe is the original of it. While
238 it was probably—in fact I think it has been quoted by several authorities, I think that is the original of it.

Q. Gideon Welles?

A. Yes.

Q. Quote 58. What is your historical authority for that?

A. Well, I refer to DeWitt first.

Q. David DeWitt?

A. Yes.

Q. What page?

A. Page 13; and in speaking of the original plot, he says:

"His enterprise, involving breach of the law of nations, was as legitimate under the rules of war as those in which these agents were engaged and needed no special sanction from the Richmond authorities."

I threw that in, but actually there are better sources for that. And there again I'll have to find it for you. I know I got it somewhere else.

Q. Does Welles say anything about this? I notice Dr. Eisenschiml quotes Welles, page 170. Did you read that source?

A. Yes. I read it before I wrote it, but I don't
239 recall—but I do recall that there was a more complete statement made as to the legality and the possibility of such a thing. In fact, I recall that the statement was made that this was a distinctly workable plan, and there were comparisons drawn between the capture of other figures in history, and it was quite an elaborate quote. I'll think of the source of it eventually.

Q. Can you consider Quotes 59 and 60 together, as regards your historical authority for them?

A. You can consider them together, except that they, I think, come from different sources. Let's see—

Q. Shall we consider them separately, then?

A. Probably so.

Q. All right. Let us take 59. What is your authority for that?

A. 59. The main authority is Gideon Welles' diary.

Q. What volume?

A. Volume I.

Q. What page?

A. Page 67. He makes the statement:

"Mr. Stanton was fond of power and its exercise. It was more precious to him than pecuniary gain to dominate over his fellow-men."

240 Then, on page 282, he says, speaking of the April 14th Cabinet meeting:

"Stanton, who makes it a point to be late * * * had not arrived."

Coggershall—

Q. What page?

A. Page 122. —quotes as well as saying that the Secretary of War came late to the meeting.

Q. Anybody else?

A. Lewis.

Q. Is that Lloyd Lewis?

A. Yes. Page 49.

Q. What does he say?

A. "* * * Lincoln eased back * * * and talked informally * * * The meeting had not yet begun since it must wait upon Stanton, Secretary of War, who was still hustling around the telegraph office."

Q. How about Quote 60? What is your authority for that statement?

A. "Then Stanton made his entrance. Lincoln said * * * 'Gentlemen, let us proceed to business.'"

There again I'm stuck for the moment, and I didn't have time to check it. I believe that I got that first
241 from the Recollections of Nicolai or Hay or Crook. That might have come from Crook, I believe.

Q. You mean, the statement that Lincoln then said, "Gentlemen, yet us proceed to business"?

A. Yes. I'm not too positive, but by the next time the question comes up I will have it.

Q. Is there anything in Gideon Welles about that? Does that come to your mind now?

A. It doesn't come clearly, and I know, of course, that he did record those little things, especially—

Q. He recorded the first part of the meeting. You covered that in 59.

A. Yes. So, as I said, I can't speak—I can't pin it down in my mind.

Q. All right. Let us come to 61. We have just a few more. What is your authority for Quote No. 61?

A. Quote 61 has a great many authorities.

Q. Can that be covered with No. 62, by the way? That covers the same subject, doesn't it?

A. Yes; it can, with an added statement of mine, which will come afterwards. For example, Oldroyd, page 5, says:

"Through a great desire to see General Grant, who was advertised in the Evening Star to attend the thea-
242 tre with the President, many persons purchased tickets for that occasion. The President was a familiar figure to many; consequently his presence did not create quite the desire to see him (as Grant)."

And Harris, on page 36, says:

"The presence of General Grant was known to the city, and it was noised abroad that both he and President Lincoln would honor the theatre * * * that evening * * *

This fact was calculated to bring out a * * * large assemblage of people."

Q. Is there any other?

A. I belive there is. Also that this came out in the testimony by some members of the theatrical crowd; some of the Ford Theatre crowd also brought this out, that there was such a rush at the ticket office that Harry Ford or one of them spent extra time in the box office and remarks that because of the presence of General Grant they had this crowd.

Now, as far as No. 62 is concerned, I think something was said here about the fact that these advertisements in the Washington papers had never been reproduced before Dr. Eisenschiml did it in his books, which is no doubt quite true.

243 But, as I said before, I spent so much time with those newspapers that I got mine from the original papers.

Q. In other words, is it your testimony that you read, as Dr. Eisenschiml mentions, the original newspapers and reproduces them in his book—that you yourself after that read the original newspapers yourself?

A. Yes. It was part of reading all of them, naturally; reading the ads or part of it.

Q. So did you get your statements about those newspaper announcements from Dr. Eisenschiml or from the actual reading of the newspapers?

A. Well, from the actual reading of the newspapers. I merely saw the ads, so I got it, I think, rather from these quotations from Oldroyd and Harris, and, as much as anyone, the—

Q. Is there anything in "Reveille in Washington" about this, if you know?

A. Yes; I think there is.

Q. Do you know at what page?

A. I can find it, if you want me to look it up.

Q. All right. Let us do that. What page are you on? Look at 389.

244 A. Oh, yes. "The news that Grant would accompany the President threw the Tenth Street Theatre into a furor, but Harry and his brothers bestirred themselves to prepare for a gala evening, well aware that the presence of the Commander-in-Chief would eclipse the patriotic doings in Grover's." Paragraph 3.

Q. Did you read that before you write your article which is in controversy here?

A. Yes. This was one of my, oh, kind of backroom pieces. Wherever there was any doubt on the line, I used her. I kept this book handy, because she covered so much ground in a few words. Then I went from there, trying to find out about it.

Q. When did her book come out?

A. It came out in 1941. I noticed her—I passed it long ago, but I notice she takes up Stanton's going home, going to the other place and going home that night.

Q. Does she say anything about what kind of drawers he had on?

A. No; she doesn't go into that.

Q. Let us see. Will you turn to Quote 63 and tell us what your authority for that statement is.

A. That I believe is Crook.

245 Q. "Through Five Administrations", I think you mentioned before. What page?

A. It's Crook, but I can't tell you the page. I don't have it here. I think that's about the time my pen gave out and I was writing with pencil.

Q. Let me put it to you this way: Dr. Eisenschiml states as his authority for his parallel statement in his Quote No. 63 Crook, page 67. Now, the question I put to you is

whether or not, before writing your piece, you actually read Crook's book on this point.

A. Yes; I did.

Q. In other words, you first saw it in Dr. Eisenschiml, whom you regarded as a great authority on this subject?

A. I won't even say that. I have a sneaking hunch that Crook was one of a great many authorities that I had read before I discovered Dr. Eisenschiml. I was already on this with my interest before then.

Q. Does the fact that Dr. Eisenschiml in his book quotes Crook's page 67 refresh your recollection, or would you have to refer to Crook?

A. I would have to refer to it.

Q. Is that available in the New York Public
246 Library, in case it becomes important?

A. It is.

Q. All right. Quote 64. What is your authority for that statement?

A. Well, naturally, everybody had brought out the fact, or a great many people had brought out the fact that the time is not known.

Q. The time of what?

A. The time of the assassination. In the book "The Assassination and the History of the Conspiracy", on page 63, is a statement, at the time that this was accomplished, which furnishes beyond doubt the hour at which the President was assassinated, which has been stated all the way from half past nine to half past ten. It probably did not vary very much from ten o'clock. "The Assassination and the History of the Conspiracy".

Q. Is that by Flower?

A. No. Flower is Stanton's biographer.

Mr. Gertz: What page?

Mr. Martineau: 63.

A. (Continuing.) That's Harris, page 63.

Q. All right. You have given us the quote.

A. All right. Back on page 356 is a quotation:

247 "Abraham Lincoln was shot a few minutes after ten o'clock on Good Friday night, April 14th, 1865."

Q. Anybody else?

A. Yes.

Q. How about Flower?

A. Well, you've got Poor's testimony and—Poor's transcript, and also Pitmann's, on the time from Sergeant Dye's position.

Q. What pages in Poor's?

A. 181 and 182.

Q. How about Pitmann?

A. I'll have to look at this. Page 72 in Pitmann. That, however, is merely a way of almost establishing the time. I take it that the objection here is to my statement of 10:13 and Dr. Eisenschiml's, at an hour close to thirteen minutes past ten p.m.

Q. Pardon me for breaking in on your thought there, but would you look at Pitmann, page 566, and see the testimony of C. V. Hess.

A. It doesn't run that high, in Pitmann.

Q. Do you find the testimony of C. V. Hess?

A. I have a hunch you've got Poor's. I think Poor's ran longer.

248 Q. If you can find the testimony of Hess, see if you can find Hess saying anything about Mr. Carland.

Mr. Gertz: That is in Pitmann.

A. In defense of Edward Spangler.

Q. Is this the testimony of Hess?

A. Yes.

Q. Do you see any reference to a Mr. Carland there looking at the clock?

A. Yes. I'll get to that in a moment. No. I see nothing on time here at all, but this is—there is obviously a

deletion, because Pitmann has thrown in here, in parenthesis, that counsel was eliciting from the witness the position of the box usually occupied by the President in visiting Grover's Theatre and the nature of the leap that an assassin would have to make in escaping from the box, when objection was made to the testimony as irrelevant.

Now, Poor may have—I can't remember—I don't think I paid any great deal of attention to Hess' testimony there.

Q. I know you are getting very tired. Maybe we can look it up at night some time.

A. Yes.

249 Q. You started to say—and I interrupted you—that you understood the objection was—

A. I make the point that there are any number of witnesses. In fact, practically everybody, every writer, I mean, makes some stab at the time. My selection of ten-thirteen came because in the course of the reading I encountered that over and over.

Now, I can't lay my hands on any definite spot. I had it, and I'll find it. But I gathered the impression that ten-thirteen was the accepted time, and I added gratuitously, because thirteen is a number intimately associated with death.

Q. You mean, appearing at page 111, paragraph 4, line 4 of True for February 1953?

A. Yes.

Q. Let us just check that a minute.

A. I say the time usually accepted is ten-thirteen. I doubt very much—in fact, I'm very positive—

Q. Let me read to you what you say exactly, because there is something left out for the sake of convenience in the quote.

I will read Quote No. 64 so we have exactly what True says here:

250 "The world knows when Lincoln died, but, oddly,

no one knows the time when he was shot. Eye-witnesses, caught up in the wild hysteria of the moment, placed the time of the shooting at anywhere from nine-thirty to eleven-seventeen. The time usually accepted is ten-thirteen— * * * perhaps because the number thirteen is so readily associated with misfortune."

Do you remember what your original manuscript had on that point instead of "misfortune"?

A. I think the original manuscript had "death". That's what I meant to say, anyhow. It said "death".

Q. It says "Death"—with a capital "D"?

A. Well, it's a figure of allegory.

Q. It is in there.

A. Yes.

Q. In other words, you started to say that you understood that Dr. Eisenschiml took exception to the fact that you stated the time or said the time usually accepted was ten-thirteen?

A. Yes. That is the only point of comparison between us in the parallel quotes, and it never occurred to me, because in my mind I think I have for many years gone on the assumption that the accepted time was
251 ten-thirteen, and I have yet to find authority for it; but I'm very positive that I didn't say ten-thirteen because Dr. Eisenschiml did. It was in my mind.

Q. Let us look for more authority on that point, shall we?

A. Yes. I know I can get it.

Q. Let us get to Quote No. 65, and tell us what your authority for that is.

A. Well, my authority first, of course, for that statement, what could be thought, is Pitmann's transcript and Poor's transcript. But here again, I think the exception is to my adding that a good defense lawyer could have pounced on this uncertainty to build up Herold's defense,

but Frederick Stone, his counsellor, said nothing at all about this.

Q. Well, that is what you said?

A. Yes.

Q. What is your authority for that?

A. Yes. That is fairly close to what Dr. Eisenschiml, there, said. Well, my authority for that is the transcript of the trial, that here is an obvious, glaring flaw in the testimony, and you would expect any lawyer anywhere to jump on it and use it in an effort to defend his client.

252 He didn't do it, and it is such a glaringly obvious omission that I didn't and don't think anyone would necessarily have to be guided by another book to jump to the same conclusion. It's another one of these things that stands out like a sore thumb in the whole thing.

Q. So that we can get it briefly, do you know at what page Poor covered this subject?

A. No, sir; I don't but I can look up Cobb's testimony in here and give you the page on that, if you want me to do that.

Q. Just take a quick look and see if it is page 253, just for the information of our friends on the other side.

A. No. It is page 84. Cobb, Sergeant S. T. Page 84.

Q. Is that in Pitmann?

A. Yes. Pitmann. Poor I don't have here.

Q. Do you know whether or not this is covered in the Philadelphia Inquirer transcript also?

A. I think this is. I believe this is part that I skimmed through. I didn't follow the Philadelphia paper too closely after discovering it.

Q. So that, shall we leave this particular subject this way: that the historical fact which you stated was

253 this vast discrepancy between the alleged appearance of this man, and from that you drew an inference which is that any lawyer worth his salt should have pounced on

that or done something about it on cross-examination of that witness?

A. Yes.

Q. Dr. Eisenschiml came to the same conclusion, in effect, didn't he?

A. Yes.

Q. Neither one of you were very complimentary to Frederick Stone, the lawyer in question.

A. I don't think any of the lawyers in that case deserve any compliments.

Q. Let us get to Quote No. 66 now, the last one.

A. All right.

Q. What is your authority for that?

A. My best authority for it—I'm looking for it along with those three others that I told you I would have to find, but the Journal of the Illinois Historical Society for December 1946.

Q. What page? Is that page 427?

A. Yes. It has a quote concerning it, and I'm afraid I'm going to have to walk over and read it to you, 254 because at the moment I can't tell you for the life of me what it says.

Mr. Martineau: Off the record.

(Discussion off the record.)

Q. Do you have the authority for your Quote No. 66 now?

A. I have found it.

Q. What is it?

A. It's an article, the name of which is "The Death and Burial of John Wilkes Booth", and it is written by Lieutenant L. B. Baker, and on page 427 he says, "General Baker felt certain that this must be the"—

Let me go back a sentence so that it makes a little more sense:

"We returned to Washington, having accomplished

nothing apparently, and all this time the men we wanted were hiding in the swamps at that very locality. General Baker felt certain that this must be the case. The large reward offered ($100,000.00) filled the whole country between Washington and Port Tobacco with detectives. They would not work with us or give us any information they obtained. They preferred rather to throw us off the trail, hoping to follow it successfully themselves.
255 And so over ten days had gone by, and the murderers were still at large."

Q. Let me ask you just these few general questions: For how many years have you been a researcher in problems involving the Civil War and Lafayette Baker and the assassination of Lincoln—or a student of these subjects, let me say?

A. I can point that out exactly. For thirteen years; because when I moved from Chicago east to—my son was one year old. He is now fourteen. And we moved, became neighbors of Manley Wellman, a very well-known writer and historical researcher, author of a book, and I had been interested in history before that. My Dad was an old-timer. Dad remembered the announcement of Lincoln's death, and my Dad was also the first Sheriff in Boone County to go to the territory in those days. So I was raised on history to a certain extent, but I never did anything about it.

So, thirteen years ago, through Manley, I began to collect books, began to make an active effort to use history as a tool in my writing. Up to that time, I had been writing science fiction.

Q. And is that the time that you began to collect
256 this very copious library that you have brought here?

A. Yes. That came when they sold out a huge

bookstore downtown on 42nd Street. I don't know what I've got now, but those were the first historical books that I got. It was thirteen years ago.

Q. At your home in Florida you have other books covering the same period?

A. Oh, yes. This is probably less than ten per cent of by Civil War books. I tried to bring only those that I could remember as being pertinent.

Q. I see. Now let me ask you a couple of more general questions. How many pieces have you written, or how many stories or articles or books, on the Civil War period since you became interested in it? You wrote "The Devil's Errandboy". You told us about that.

A. "The Devil's Errandboy". "The Spy Who Saved the Union".

Q. Have you published that one yet?

A. Yes. That's the first. It was published, and it will eventually come out in book form.

Q. Then you have covered "The Spy Who Saved the Union", "The Devil's Errandboy", "America's Greatest Unsolved Murder", which is the one involved in this 257 lawsuit here?

A. Yet. They all belong together. The research on those is interlocking. And I have quite a few smaller pieces, and probably a half a dozen minor pieces.

Q. And are you still collecting books from the Civil War and still passionately interested in it and all of its problems?

A. Not all of them. My interest is rather limited to certain parts of it. I don't care a darn about the battles of the war. I'm still interested in people that were involved, and I'm still picking up books on it, but leading to a purpose I have: doing a couple of novels on the common,

every-day people involved in the war; not in the movement of armies and generals and all that, which I find boring.

Q. This piece which is in controversy here: "America's Greatest Unsolved Murder". That is not your first piece on the Civil War period or the characters involved in it?

A. No; it is not.

Q. Would you estimate how many dollars you have invested in your Civil War, Baker and Lincoln library, if I can call it that? Will you give us an estimate on
258 that? Does it run into tens, hundreds or thousands, would you say?

A. I would say probably a couple of thousand dollars, but that's an awfully wild guess.

Q. In other words, is this the fact—

A. I can't think of a basis right now on which I could give you a sound guess.

Q. In other words, whenever you see a book that is interesting to you at some sale, if you can afford it, you buy it or acquire it?

A. Yes. Some I got in such a manner that I could not tell you what they cost me. I know they are worth a great deal. I have this atlas which has the hand-painted map of the streets of Washington at the time of the assassination. I picked that up with it and didn't know I had it. I paid a few dollars for a arm-load of books I wanted on some other research project.

Q. Did you copy any of your material from Dr. Eisenschiml's two books in question: "Why Was Lincoln Murdered" and "In the Shadow of Linclon's Death"?

A. Well, I did, the ones that I brought out here. I copied the O'Beirne quote—the quote from O'Beirne's diary, the entry; and I made use of, without directly
259 copying, Dr. Eisenschiml's timetable.

Q. The Camden and Amboy?

A. Yes. And I believe there are two or three others.

Q. As the testimony has shown?

A. Yes. As for sitting down and copying, no, not from him or anybody else, except that if I am trying to present a rounded picture of something, where no new evidence is readily obtainable, like anyone writing on the Lincoln field today, it is an assemblage of and re-evaluation of available material, and that is what I was trying to do.

Q. Is this story, "America's Greatest Unsolved Murder", or is it not the product of your own ingenuity and research and hard work?

A. Yes; it is.

Q. In other words, you are the first to admit that Dr. Eisenschiml, the plaintiff, is one of the world's greatest scholars on this subject?

A. Yes. I have done that, a great deal.

Q. And you are the first to give him credit?

A. By no means the first, but I certainly am right up at the top.

Q. In other words, you will bow to no man in doing honor to Dr. Eisenschiml as such a scholar; is that right?

260 A. Yes. He has changed the course of history—or changed the knowledge of history by his discoveries. History can never be written the same again as a result of his work. That is rather a serious thing to think about, because a man writing now is faced with that fact: If he follows the old line, he is wrong.

• • • • •

262 Q. Mr. Millard, I have just a few questions to ask you before Mr. Gertz examines you. Will you tell us how long you have been a writer, Mr. Millard?

A. Well, I have been a writer full time about 16 years, but I have been at it about 25 years, I would say, or more, altogether.

Q. By the way, I don't think you told us what your age is. Do you mind?

A. No. Forty-seven.

Q. In other words, you have been a full time professional writer for 16 years?

A. Yes.

Q. In all your experience as a writer were you ever accused of plagiarism before?

Mr. Gertz: Objection.

Mr. Martineau: I will just note an objection for 263 Mr. Gertz.

A. Never.

Q. I don't know whether you made this clear yesterday, but did you read Dr. Eisenschiml's two books involved here prior to the time that you wrote "America's Greatest Unsolved Murder"?

A. Yes, I did, sure.

Q. When did you read them first?

A. First I would say about six years prior to the writing of this.

Q. In other words, you mean six years prior to—I think you said yesterday you started to write this around March, 1950. Was it 1950 or 1951?

A. '51.

Q. So it would be some six years prior to t[illegible] that you read Dr. Eisenschiml's works?

A. Yes.

Q. Now, as you were writing your manuscript "Ameri-

ca's Greatest Unsolved Murder," did you consult Dr. Eisenschiml's two books with any frequency at all?

A. Not with great frequency, I guess. Where I was dealing with a situation or a scene or a part that I wanted to get accurately I would sometimes consult four and
264 five books, or the notes on those books, to be sure I had balance between one man's opinion and another of what happened or what they think happened.

Q. In other words, you regarded Dr. Eisenschiml as the world's greatest authority on this particular subject, namely, the assassination of Abraham Lincoln?

A. I think Dr. Eisenschiml is the only man who has ever made a career out of that particular part of Abraham Lincoln's life—the assassination. He is the authority.

Q. As I understand, in preparing your manuscript you consulted Dr. Eisenschiml among other authorities that you had named yesterday?

A. Yes.

Q. Did you ever consciously copy from Dr. Eisenschiml's works?

A. No.

Q. I beg your pardon?

A. No, I said.

Q. I wonder if you would be good enough to explain your particular individual method of writing, Mr. Millard?

Mr. Gertz: Objection.

The Witness: Does the objection mean that I shut up or go ahead?

265 Mr. Martineau: No, he is recording his objection.

Mr. Gertz: We have a stipulation with each other.

The Witness: I see. My methods of work on a particular thing like that is to first read everything available on the subject that I am planning to write on, or on anything related to it, and just sit down and read possibly

10 or 12 or even 15 books in a day, just fill myself with them, and let that stew for a few days. And finally out of my mind or my subconscious will shape the form or method in which I want to do my story. And then as I work then it is necessary to check dates and spellings, and items like that. But I know pretty well by that time, from this absorption of everything, what I am going to write.

Q. These notes you spoke of yesterday that you told us about, the notes that you had in connection with "America's Greatest Unsolved Murder," could you tell us in the main what they consisted of, whether they were, shall we say, parts of the draft of your work, or were they reference, or what?

A. I can show you two of them I found in books.
266 They didn't get thrown out because I was using them as bookmarks. It will give you an idea of the wide variety of so-called notes I used.

Now, that is—(handing to Mr. Martineau).

Mr. Martineau: This will be Defendant's Exhibit 5 for identification.

(Card marked Defendant's Exhibit No. 5 for identification, as of this date.)

Mr. Martineau: And I will mark this right now as No. 6.

(Typewritten page marked Defendant's Exhibit No. 6 for identification, as of this date.)

The Witness: This is scratch paper (indicating).

Mr. Martineau: Let us cover these first.

By Mr. Martineau:

Q. Calling your attention to Defendant's Exhibits 5 and 6 for identification, are these two of the notes which you produced, which you just mentioned?

A. Yes.

Q. Now, take the reverse side, the front side of Defendant's Exhibit 6—I will quote it—"From Steffan Lorant. 'Lincoln, His Life in Photographs'."

267 Is that the note you have reference to?

A. That's the one, yes.

Q. And not the material on the reverse side?

A. Not the material on the reverse side.

Q. Which is headed "Booth and Lady"?

A. No.

Q. By the way, when you wrote this book, this article "The Devil's Errand Boy," that we talked about yesterday—you have examined the photostatic copy of an excerpt from that which is attached to Dr. Eisenschiml's affidavit in support of his motion for summary judgment, have you not?

A. I have.

Q. And in that excerpt that is a true and correct photostat of True Magazine containing that story of yours, "The Devil's Errand Boy," is it not?

A. Yes.

Q. In this I notice you credit Dr. Eisenschiml on Page 75 of True Magazine for that number, and it is the third—

A. May I quote one word there?

Q. Let me finish.

A. Yes.

Q. —and it is the 3rd page of the photostat about
268 the top of the page here. You say this: "To recount only the known facts about the assassination would fill volumes and leave most of the important questions unanswered. Mr. Otto Eisenschiml of Chicago, the outstanding authority on Abraham Lincoln's death, has devoted a lifetime of intensive research to the subject. His two books—'Why Was Lincoln Murdered' and the 'Shadow of Lincoln's Death'—are packed with his own sensational discoveries, yet he feels that the surface has barely been scratched."

That is the reference where you credited Dr. Eisenschiml as a great authority in this field?

A. Yes.

Q. You say you wanted to add something?

A. I wanted to change something, but you have now corrected it. You said credited Dr. Eisenschiml, and I wanted to point out I wasn't crediting him for any special excerpt there. And then later you said crediting him as an authority—which I had in mind.

Q. It is apparently a term of art and I misused it.

A. Yes.

Q. In your manuscript in the story involved here, which is "America's Greatest Unsolved Murder," did you likewise mention Dr. Eisenschiml in your original manuscript?

269 A. Yes, I did.

Q. Can you find that in Defendant's Exhibit 2 for identification (handing to the witness)?

A. I will have to look a little. I am not quite positive now what point I referred to. (Examining papers.)

Mr. Gertz: I have it. It is Page 58 of the manuscript.

The Witness: Thank you.

Mr. Martineau: I guess it is that pencil page.

Mr. Gertz: Yes.

Mr. Martineau: Here it is.

The Witness: Yes.

Mr. Martineau: It is typewritten at the top Page 68, and then there is a pencil mark Page 58, for your convenience.

Mr. Gertz: Yes.

By Mr. Martineau:

Q. Would you read into the record that part there where you mention Dr. Eisenschiml at that place in the manuscript?

A. Yes, I say "Dr. Eisenschiml, probably the world's leading authority on the mysteries of the Lincoln as-

270 sassination, has in one curt sentence treated Stanton's

story to the respect it deserves. He writes 'It would be exceedingly interesting to have the name of the bell-ringer who was so busy with other orders that he had the audacity to incur the ire of the all-powerful Secretary of War by postponing the repairs on what was then perhaps the most important door bell in Washington'."

Q. I notice, Mr. Millard, that appears in the manuscript to have been crossed out or cut.

A. Yes.

Q. Did you cross that out or cut it?

A. No, I didn't, no. This was all done in "True."

Q. Was that done after you were down in Florida?

A. Yes.

Q. The manuscript does appear from its face—I don't think I am testifying—to have been just about cut in half, doesn't it?

A. It was. It was cut from about 40,000 words to about 25,000.

Q. And that mention of Dr. Eisenschiml in this manuscript was done with your knowledge?

A. No. The cutting of it, you mean?

Q. Yes.

271 A. No, it wasn't.

Q. When did you first find out that Dr. Eisenschiml's name had been cut?

A. When I saw the printed copy, bought it as a news stand.

Q. Now, in your career as a writer, Mr. Millard, have you ever written what I might in my naivete call—my ignorance, put it that way—a documented historical piece with footnotes of bibliography?

A. Yes, I have, I think, and one I intend to continue with and expand into a book—into a full book. It appeared in "True" under the title of "The Spy Who Saved the Union".

Q. What I meant was, Mr. Millard, in that piece, which I do not have before me, did you have footnotes on bibliography?

A. No, they simply don't do it. The magazines, I think, with the exception of an actual historical magazine, never do include that.

Q. When you wrote and presented to the Defendant this manuscript, "America's Greatest Unsolved Murder"—I mean, the one that was later published under that name—were you intending or attempting to present that as a documented historical work or as a detective story or as a mystery story?

A. Well, I was intending to present it as a popu-
272 larized piece of honest history, but, nevertheless, presented in such a way that it would appeal to people who won't pick up a historical text book and read it. And I used the form of the mystery because it seemed a good way to go about it.

Q. In other words, were you trying to stimulate the interest of the reading public in this all-important subject?

A. Yes.

Q. Of Abraham Lincoln's assassination?

A. Yes, that I was very much.

Mr. Gertz: I object. Also show that I move the answer be stricken.

Q. Are you a member of the Civil War Round Table Club of Chicago?

A. No, I am not.

Q. Of which Dr. Eisenschiml, and, I believe, my distinguished opponent Mr. Elmer Gertz are prominent members?

Mr. Martineau: Is that right, Mr. Gertz?

Mr. Gertz: Yes.

A. No. I very nearly moved back to Chicago with just

the hopes I could get into that group at one time. It always sounded like such an interesting bunch, and I was invited once to come and make a talk there, which I never got to make, but—

273 Q. When was that that you were invited to make a talk before the Civil War Round Table Club?

A. That was following the publication of "The Spy Who Saved the Union."

Q. That was, I think you said yesterday, about this man Stidger?

A. Right.

Q. What is his first name?

A. Felix.

Mr. Gertz: Mr. Martineau, would you be good enough to furnish me with a copy of the issue of "True" magazine containing the Stidger articles, since you referred to it?

Mr. Martineau: I will. I want to see it myself. I will make a note of it right now.

* * * * *

274 *Cross-Examination by Mr. Gertz.*

Q. Mr. Millard, do I understand you correctly that you have said that the books on the ledge in this office are only the pertinent ones with respect to the subject matter of the February, 1953 article in "True" magazine?

A. Yes. They are most of the pertinent ones that I had. They are what I could remember of them in going through the books from storage and snatching out books that I knew I had used.

Q. What do you mean by pertinent ones?

A. Well, I have many times as many books as I have here on the Civil War period as a whole. These were, as far as I could remember, the only ones that I had used, either in hunting for something I couldn't find or in actually finding something that was used.

Q. I show you the book entitled "Prince of Players, Edwin Booth," by Eleanor Ruggles—

275 A. May I save some time and remind you gentlemen that yesterday I said that this was included by accident. I know what you are driving at.

Q. In other words, this particular book is not one of the pertinent ones?

A. This is not one. This is one I obtained since then, and in snatching everything I grabbed it without thought. As I said yesterday, I said even to Dr. Eisenschiml, this does not belong in that pile for that reason.

Q. In other words, that is not a pertinent book?

A. No, that is not.

Q. I show you "Abraham Lincoln, the War Years," by Carl Sandburg, Volume 2, and ask you to examine it. Will you point out in that volume the pertinent material used or consulted by you in connection with the February, 1953 article?

A. I am afraid I can't for the reason that the use that was made of that, as I said a few minutes ago, was in reading everything I could. And I sat down and I read through all of Sandburg again as part of the preparation for this piece. You see, I didn't know when I started out—I had no way of knowing that on page so and so in such and such a book I would find an answer. I was trying to treat it as

a whole. I was trying to construct in my own mind

276 the situation which goes clear back, has its roots back 10, 20, 30 years before, in Lincoln's life and in the life of other people.

Q. Can you point out one page, one paragraph, one chapter, one portion of the book I have in my hand, Volume 2 of Sandburg, having any relevance to the February, 1953 article?

A. Not without some time. I might not even be able to do it then.

Mr. Martineau: Just a minute, if you will pardon an interruption, Mr. Gertz, can you go through your notes that you used and see if you can answer Mr. Gertz' question—the cards that you had?

The Witness: No, my cards do not refer to that. You will find many books there; a great many, in fact, which you can treat the same way, but I started with no preconceived notion. I didn't start out only to read what somebody said about the assassination.

* * * * *

277 Q. I show you another book from the said group called "Report On the Organization and Campaigns of the Army of the Potomac," by George B. McClellan, and ask you to examine it (handing to the witness).

278 Will you point out anything in that book having any relevance or pertinence to the February, 1953 article?

A. Not directly, no.

Q. Or indirect?

A. Indirect, yes, if I point to the life of McClellan himself. The fact that McClellan was part of the faction involved in a controversy, he was associated with the radical element later, or supposed to have been, then I figured part of an understanding of the situation was in going back, rereading correspondence, and the gradual build-up to the break between McClellan and Lincoln.

Q. Is it a fact that McClellan, far from being connected with the radicals was one of the principal opponents of the radicals?

A. Yes, probably. I am talking of accusations, not of—

Q. So that when you said that he was connected with the radicals, the exact opposite was the truth?

A. I said he was said to have been connected with radicals. I believe that.

Q. Said by whom?

A. That I can't judge.

Q. Will you tell me how a book published in 1864 could have any pertinence to the assassination which oc-
279 curred in 1865?

A. I think I just have.

That, I believe, is a duplicate copy which I called your attention to yesterday (indicating).

Q. In other words, there are two copies of the said book, and your answer with respect to the second copy, which I am holding in my hand, would be the same as your answers to the similar questions on the first copy?

A. Correct.

Mr. Martineau: Off the record.

(Discussion off the record.)

Q. I show you another book from the said pile, "The Diary of a Public Man," an edition published in 1945 by Abraham Lincoln's Own Book Shop, and I ask you to examine it (handing to the witness).

Will you state the pertinence or relevance of that work to the February, 1953 article?

A. Yes, that is a little more direct.

Q. What is that?

A. The personalities and actions of many of the characters involved in the final drama of the assassination, the men around Lincoln, the interplay of arguments and their personalities are brought out quite clearly. I used it
280 very definitely for that.

Q. Are you through?

A. Yes.

Q. Which particular men are you referring to?

A. Well, the members of the Cabinet.

Q. Specifically, whom?

A. I can't tell you offhand. I guess—as I remember, Stanton appeared there only once, except through the letters. I was interested in those.

May I look at the book for a minute?

Q. Surely.

A. And refresh my memory, because I think I can explain the handicap you are laboring under here.

Q. Surely (handing to the witness).

Mr. Martineau: Off the record.

(Discussion off the record.)

A. (Resuming.) I don't think I can pinpoint any particular person on here that became directly used.

Q. Mr. Millard, doesn't that book deal with the period immediately preceding and following the first inauguration of Lincoln?

A. That's right.

Q. Isn't it a fact that many reputable historians re-
281 gard that as a work of fiction rather than the genuine authority?

A. I don't know that many do. I know its authenticity is unquestioned, but I was given to—I have gathered from my own reading on it, that it is more generally regarded as fact than fiction because of the many points that could be verified in it. There are many points that have been, of course.

Q. Did you ever read a book by a man named Anderson with respect to the subject matter?

A. No, I never did.

Q. Did you ever hear of the book?

A. At the moment, I can't recall it.

Q. Do you know who the public man whose diary that purports to be is?

A. No.

Q. Does anybody know?

Mr. Martineau: Don't shake your head.

The Witness: I am sorry. No.

Q. Does anybody know?

A. As far as I am aware, no.

Q. And nobody knows whether or not he actually existed?

A. That's right.

282 Q. Was the manuscript of that alleged diary ever found?

A. No, as far as I know.

Q. Is there anybody who ever at any time vouched for the authenticity of the diary?

A. That I can't answer.

Q. Isn't it a fact that nobody ever vouched for the authenticity of the diary except the editor of the North American Review?

A. My feeling is that it has been—now, wait a minute, you said vouched for. I guess you are correct in that interpretation. I think it has been accepted by him, but vouched for, no.

Q. Isn't it a fact that nobody connected with the North American Review, other than the editor, ever said publicly or privately that the diary was genuine?

A. I rather gather so from the preface in there.

Mr. Martineau: The preface in where?

The Witness: In the Diary of the Public Man.

Q. In doing your article, did you make any effort to ascertain that other sources were genuine or authentic?

A. I made every effort to.

Q. But in this particular work you didn't make the effort?

283 A. As I told you before, I used that for background. You must realize— May I volunteer some information at this point?

Mr. Gertz: Let us see.

The Witness: Which will—

Mr. Gertz: What I will do, if you are agreeable, is to permit him to volunteer, but for each volunteered state-

ment it is assumed that it will be followed by a motion by me to strike.

Mr. Martineau: All right. That is fine.

Q. Go ahead.

A. What I want to volunteer—and it applies to every similar question that will be brought up here in the future—is that when I finally was engaged to do this job, I came into it not as having a great deal of prior knowledge in the field. I had considerable curiosity, and I had in the past on occasion done some reading on the subject, but, nevertheless, I was approaching it as I approach every writing job, as an invasion of a new field. And it is first necessary for me to get the feeling of the field, the people involved, the undercurrents, the news of the day, everything that will help me to formulate in my mind, to build up the feeling that I am striving for so that I have some—at least
284 feel that I have some understanding of the actual events.

Q. So that when you stated that pile of books and magazines was pertinent, all you meant to say is that it gave you some background material?

A. That's right.

Q. And not necessarily direct material?

A. No. In fact, I believe I stated yesterday that a great deal or the bulk of the pertinent material I do not own. I got that through libraries and through outside reading.

* * * * *

Q. Did you ever hear of J. E. B. Stuart?

A. Yes.

Q. Sometimes known as "Jeb" Stuart by reason of his initials.

A. Yes.

Q. When did he die?

A. I think about '63 or '64. I am not sure of that.

285 Q. I show you a book, "Wearing of the Gray," by John Esten Cooke, which is taken from the pile produced by you (handing to the witness).

Are you familiar with that book?

A. Yes.

Q. That is the life of Stuart, is it not?

A. Well, it's the life of the man who rode with him.

Q. And it deals with the escapades of Stuart?

A. Yes.

Q. Who was one of the romantic characters of the South?

A. Yes.

Q. Would you tell me briefly what the pertinence of that book is to the subject matter of the February, 1953 article?

A. Yes. That is one of the—one of quite a few books you will find over there dealing with the Southern side, the Southern viewpoint as it was published.

Q. The Southern viewpoint of what?

A. Of the war, on the period of the war. The Southern sentiments as opposed to the Northern sentiments.

Q. Does your article deal with the war as a whole, or does it deal with the specific aspect of the assassination?

A. That is a question I never dared answer, nor do
286 I think Dr. Eisenschiml dare answer that, because it is still a moot question.

Q. Will you—

A. Just how far the assassination was an outgrowth of the war is still an unsolved problem.

Q. Will you point out anything specifically in the book, "Wearing of the Gray," which is used in connection with the February, 1953 article?

A. There is nothing in it. I can say without looking.

Mr. Martineau: You mean nothing specific?

The Witness: Nothing specific.

Mr. Gertz: I wonder if we can agree, without my having to repeat it, that all of these books are from the pile produced by Mr. Millard, so we do not have to repeat that?

Mr. Martineau: Sure, agreed.

Mr. Gertz: By referring to the article in question, we mean February, 1953.

Mr. Martineau: Why not call it the article in question and save your energy? In other words, until further notice all the books we are examining on are from the pile produced by Mr. Millard.

Mr. Gertz: All right.

287 Mr. Martineau: If you just say "Your article," then we can agree that means the one in question in this case.

Mr. Gertz: That it does not mean other articles of his.

Mr. Martineau: This article.

Mr. Gertz: Right.

Q. I show you "Statistical Record of the Armies of the United States" by Frederick Phisterer, and ask you to examine it (handing to the witness).

What, in that book, did you use in connection with your article?

A. That I used a little more directly in checking on points of statistics on the make-up of the Department, the Military Department, and the background material like that that I thought I would need or did actually use here and there a figure.

Q. Will you go through this book and point out the portions which you used?

A. I will try.

(A book was handed to the witness.)

A. (After examining.) I remember that I used the chronological list of battles on several occasions when

288 I thought I was going to include some background on

battles, and this was the handiest place to be sure I had the right date and the right place.

Q. But did you use any battle material directly?

A. I can't remember. If I did, it was not in the final one. Whether it was in the original manuscript or not I cannot recall.

Mr. Martineau By "original manuscript" you mean—

Mr. Gertz: You mean Defendant's Exhibit 2?

The Witness: Yes.

By Mr. Gertz:

Q. What did the battles have to do with the assassination?

A. Well, you might ask what did the Civil War have to do with the assassination. I can only repeat, that when I started out I started with no preconceived notion about what I was going to find.

Q. Yes. Now, have you completed your reference to pages or passages of the Phisterer book which you used in connection with your article?

A. I have.

Q. I show you "The Footprints of Time," by
289 Charles Bancroft, and ask you to examine it (handing to the witness).

Point out any portions of that book having pertinence to your article.

A. Yes, I think I can in that particular case.

Mr. Martineau: Take your time now.

Q. By the way, don't let me hurry you, Mr. Millard.

A. No, I won't.

Q. I assure you, I am not trying to confuse you or do anything except elicit answers.

A. I realize that.

I recall keeping this book open chiefly for the chronological—the dates given here and the incidents at the time.

Q. Will you give the page?

Mr. Martineau: Refer to the page.

A. On pages 676 through 680, primarily. There is another part in here that I believe I did use.

This was, you understand, a place to grab some quick bits of information that I can't carry in my mind, because I am no good on dates unless they are written down; for instance, Lincoln's Cabinet—

Q. Would you be good enough, Mr. Millard, to give the page numbers?

290 A. Yes, page 397. We have Lincoln's Cabinet here.

And I never could remember who was in that cabinet.—Those names are always vaguely confusing.

Q. When did Stanton become a member of Lincoln's Cabinet?

A. I can't tell you the date. It was after he had pulled his nice little trick and gotten—was it Cameron—sent to Russia, or some other place. I am a little hazy on that, but I believe he was considered responsible for getting his predecessor out and getting into his place.

Q. Who were Stanton's assistants as Secretary of War?

A. Dana was one. And I don't recall the other at the moment.

Q. Any other one?

A. Was Foxx in there? No, I can't tell you.

Q. Can you name even one other assistant of Stanton's?

A. Well, aside from Eckert, who was his—

Q. By assistant, I am referring to Assistant Secretary of War.

A. Yes.

Q. Not employees of the War Department. I mean Assistant Secretary of War.

Mr. Martineau: Can he name it from his memory 291 or can he get it from a book?

Mr. Gertz: From his memory.

A. No, I can't.

* * * * *

292 Q.—I show you "The Secret Service," by Albert D. Richardson, and ask you to examine it (handing to the witness).

What is the pertinence or relevance of that book to your article?

A. (After examining.) I realize what I should have been doing last night, is rereading my own original manuscript, because I can't remember now—

* * * * * *

293 The Witness: On page 315, paragraph 4: "I have alluded in earlier pages to remarks touching the reports that Mr. Lincoln would be assassinated, which I heard in the south on the day of his first inauguration. 294 Afterward in my presence several persons of the wealthy slave-holding class alluded to the subject, some having laid wagers on the event. I heard one man condemn the proposed assassination, and he was a Unionist."

Mr. Martineau: He was what?

The Witness: A Unionist. This refers back to the part I am trying to find, but I don't lay fingers on it. Do you want me to look for it?

Mr. Martineau: Keep looking.

The Witness: I will find it if I have to read the whole book through.

Mr. Martineau: Do the best you can, but give him a full answer. He wants to know, if I recall correctly, what parts, if any, are pertinent to the article.

The Witness: That is the part that is pertinent, but finding it is apparently a matter of going page by page now, though I used the whole book with considerable profit, I would say.

By Mr. Gertz:

Q. That book was actually published before the assassination, wasn't it?

A. Yes, it was. I think it was. But at least what
295 it was dealing with was the earlier assassination rumors and reports, and you will find in several cases I was trying to find out more about that, because of the first claims, historical or not, that this was all a culmination of a plot that had been started four years before, and that it involved some of the same people.

Mr. Martineau: Have you finished your answer? Take your time now.

The Witness: Yes. If you want me to find this other part that he refers to here, I will find it.

Mr. Martineau: Find it. He asked you for all the parts, so give it to him. As Grant said, "We will fight it out on this line if it takes all summer."

The Witness: Yes.

(Witness resumes examining book.)

The Witness: I find something here, which—whether I used it or not, and I don't remember—it catches my eye as something that I intended to make use of.

Mr. Martineau: What page?

The Witness: The bottom of page 44 and top of
296 page 45. I won't quote it completely, but it is on the attitude of the Rebel papers and the things they said about Lincoln at the beginning of the war and again later in the war—some changes in their attitudes.

By Mr. Gertz:

Q. Is that all, Mr. Millard?

A. I still haven't found the specific material on the assassination talk which was my main interest and use here.

Mr. Martineau: Take your time and go ahead and find it. Answer his question.

Mr. Gertz: Take your time.

(Witness resumes examining book.)

Mr. Martineau: Off the record.

(Discussion off the record.)

Q. Does that book that you are now looking at deal primarily with dungeons?

A. No, this is the war experience of Richardson of the New York Tribune. He was serving partly as a spy; he went to the Rebel capitol. He went to a number of Rebel places. He was captured, and there is a small amount—but most of this is very good background material. I used this book.

Mr. Gertz: May I suggest, since in this instance
297 Mr. Millard has taken, I think, about 10 minutes, that although I have no objection to his referring to it later, I would rather move on with the examination.

The Witness: Actually, I have answered your question. In reading this—

By Mr. Gertz:

Q. In other words, you haven't been able to find any thing?

Mr. Martineau: You mean in this 10 minutes?

Mr. Gertz: Yes.

A. I have been able to find only the fact proving that it is in here, what I am looking for.

Mr. Martineau: Shall we leave it this way, that he will at some time that won't hold up the examination, examine that book again to find out other parts that he used in order to answer your question properly? Is that all right?

Mr. Gertz: All right.

Q. Now, I show you an impressive array of books under the title "Photographic History of the Civil War in Ten Volumes," by Francis Trevelyan Miller, editor in chief.

Did you use material from each of those 10 volumes
298 in connection with your article?

A. That's a question I can't answer at the moment, but I rather suspect yes.

Mr. Martineau: Look at the volumes. Maybe it will suggest something to you.

Q. Look at the volumes.

A. If I may look at one of the exhibits I have handed over, I can—my card of notes refers to this.

Mr. Martineau: By this you refer, sir, to Defendant's Exhibit 5 for identification?

The Witness: Yes. This covers Volumes 7, 8 and 9, so I know I used those, because—

Q. Will you find 7, 8 or 9?

A. Yes.

Q. What about the other volumes?

A. This is only in regard to Booth. Now, I used other references in regard to other—

Q. Let me take up certain things—

Mr. Martineau: When you said "this," you meant Defendant's Exhibit 5, your note?

The Witness: Yes.

Q. I want you to look particularly at Volume 9, "Poetry and Eloquence." That is the sub-heading of 299 that volume (handing to the witness).

Will you show me what you used for that?

A. Yes. Incidentally, it isn't all poetry in spite of its title.

(After examining.) Something is very sour with that particular note, I can tell you. Only one of them matches up.

Q. Referring to the notes in Defendant's Exhibit 5 for identification?

A. Yes.

Mr. Martineau: One note, I think he said, didn't he? That note, he said.

The Witness: One note which I have reference to in which I kept out to use—and which I kept out to use was a picture of the procession at Lincoln's funeral in Washing-

ton, which I wanted to use in case I described it to some extent.

Others here have me slightly baffled (examining).

Mr. Martineau: Is the record clear which one of those volumes he is referring to?

Mr. Gertz: Yes, the one that has the general title "Poetry and Eloquence."

300 Mr. Martineau: Which volume is that?

The Witness: Nine.

Mr. Gertz: Nine?

The Witness: I see now—yes, on Page 128 there is a rather critical reference to the days following the assassination and John's—the opinion of Johnson's ability. In fact, there is a sentence here which sets the pace—this, incidentally, is a southern viewpoint which was interesting to me. May I quote a couple of sentences here to give you an idea?

Mr. Martineau: Go ahead. He asked you for it.

The Witness: Yes.

(Reading): "We all remember how by the grim mockery of fate—as if to test to the uttermost the American capacity for self-government—Abraham Lincoln was snatched away at the moment of crisis, from the helm of state and Andrew Johnson substituted for him. I think it no doubtful anticipation of historical judgment to say that a more unfortunate selection could not well have chanced."

There is more of it, but that's as much as I wanted
301 to refer to, and it is part of an article on the southern viewpoint.

Now, I will probably find the reason for 258 if I look more closely.

By Mr. Gertz:

Q. You say this Southern viewpoint article is by Charles Francis Adams?

A. Yes.

Q. Wasn't he the Northern minister to England during the Civil War?

A. I don't know. He could be.

Dr. Eisenschiml: Not could be; it is.

Q. What was his relationship to Henry Adams?

Mr. Martineau: Pardon me, let me get straight on this. Did he say the Southern viewpoint was expounded by Charles Francis Adams? I didn't get that straight.

Mr. Gertz: That is what I understood him to say.

The Witness: Oh, no. I see—it is a tribute to Lee, and I said Southern viewpoint. I see it is a New England tribute to Lee, the title of the article, so it is not a Southern
302 viewpoint. But nevertheless it—I was not as dumb about it at the time I used it as I am now, because I am trying to pick it up after years of having forgotten it.

By Mr. Gertz:

Q. Now, Mr. Millard, you say only certain of the volumes of this set of Photographic History are actually pertinent?

A. No, I think every one.

Q. Every one?

A. I believe there was no volume there that was not used for some purpose or other.

Q. Even though in Defendant's Exhibit 5 there is no reference to several other volumes?

A. That is only Booth, and Booth was only one character. This is only one card on Booth in relation to that.

Q. I won't go through all of them, but let us take Volume 1, the opening battles, that period pertaining to the opening battles of the Civil War, Bull Run or Manassas and those other opening battles. What was the purpose of your article?

A. The first one that comes to my mind, before I even look at it, is that this contains the fairly complete story of

photography during that period, Brady and Gardner, and those fellows, and at one time I was quite interested—
303 you will find another book on the subject over there— that portion of Lincoln's later days dealing with the photographs by Brady and Gardner.

Q. But in your article you do not deal with photography, do you?

A. No, I don't know that I even refer to it there finally, but it was one of the facets of the matter that I was attempting to look into. I can tell you how I st rted out to use these, if you would like me to, which may clarify it.

Q. Are these all ten volumes?

A. All ten.

Q. All ten and each of the ten?

A. Yes, in preparation for the writing, while I was soaking myself in the background for what became the final article, among other things, I sat and took these page by page, all ten volumes, and whenever I came to a photograph whose cut legend bore some information on a character I thought I might use, or where a photograph was of a scene I thought I might want to describe in the final draft, or where the text itself dealt with anything that seemed that it might be pertinent in the future or might be used to refresh my memory on a background, I stuck a card in. In the case of Booth I made those notes. I think in the case of others I didn't, because I wasn't pursuing
304 any one person on through here, except I did want that as part of the Booth stuff.

So I went through page after page, and every once in a while in here, while it is chronologically in its right place, it also has some connection with the eventual assassination.

Q. Yes. So that except for the account of the photography of the Civil War in Volume 1, actually you used nothing in Volume 1 in connection with your article?

A. No, I didn't say that. I said that is one thing I remember.

Q. Tell me what else in Volume 1 you used in connection with your article?

A. I shall try to tell you now; I don't know if I can.

* * * * *

305 The Witness: May I add one thing to my answer?

It occurred to me one thing I was searching for in here was everything on Grant, and I was taking it like Booth. And I don't have a card, but wherever Grant appeared I stuck a card in, and when I got ready to build up Grant, I got references in there, most of them useless but background on Grant.

By Mr. Gertz:

306 Q. In connection with your article, have you any remembrance that Grant was slated to appear at the Ford Theatre the night of the assassination?

Mr. Martineau: That is calling for quite a conclusion, is it not?

Q. Isn't that so?

A. No.

Mr. Martineau: It has no connection with the article.

Q. What other reasons were there for considering Grant important in connection with your article, not in connection with the Civil War?

A. There are a great many references to Grant in there other than hi apparent defection over a long time. For example, in my original—I do remember this—in my original manuscript, except something here, I covered instances where someone, possibly—and possibly not Booth—followed Grant and followed Mrs. Grant, sat at the next table glaring at her, spoiling her meal, and references to strangers, some who probably were not Booth, but seemed to be dogging Grant's footsteps. I have that in the original. I

believe it was left out and it was cut from the printed version. So Grant was for—a little more important
307 than just that, aside from his importance as a background key figure in the situation.

Q. Now, who was George Sands Bryan?

A. I don't know, except the author of "The Great American Myth." I only know his name from that.

Q. Is he living?

A. I don't know.

Q. Other than the book "The Great American Myth," did he ever write anything else?

A. I don't know.

Q. Did you ever check up on the authenticity of "The Great American Myth"?

A. No. I was taking nothing from it actually that required authenticating, I don't know. That is, I wasn't using a statement of facts that was not at least verifiable through some other source.

Q. Is it not a fact that in "The Great American Myth" the author credits Otto Eisenschiml for some of the material that you used?

A. Yes, I really think so. I think his bibliography credits are fairly complete.

Q. So Mr. Bryan doesn't actually present new material; it was simply material taken from Otto Eisenschiml?

A. Yes.

308 Mr. Martineau: Wait a minute now.

Mr. Gertz: He has answered yes.

The Witness: As far as I know.

Mr. Martineau: Have you got the book here?

The Witness: No, I haven't. I don't own it.

Mr. Martineau: Is that the only type of material taken, just something from Dr. Eisenschiml?

The Witness: No, that was only a small part of it.

Mr. Martineau: I am not sure you understood that question.

By Mr. Gertz:

Q. Do you know whether or not Mr. George Bryan got permission from Dr. Eisenschiml to use material in his book?

A. I don't know. I have no reason for knowing. I mean, I didn't check that.

Q. When did your article, it was with the expectancy that the article in its original form would appear in a paper or book?

A. In a magazine.

Q. In addition to the magazine publication, was it not also to be republished in book form?

A. I had hoped to make this much of it redone, re-309 worked, a portion of a full book.

Q. If it were to be published in book form, wouldn't you require your notes and references?

A. Yes, I probably would have, but on the other hand, I had already been discouraged from that by the fact that this being cut—I might explain, it was my hopes when this was written that "True" would decide to run it in its entirety in two installments, which is the reason for the extra length, in which case I could then have afforded from the income from that to go back and rework it on a little different style and then continue with the portion that is not touched on here and expand it.

Q. Isn't it a fact that at the time of the publication of your article, "True" held out to you the hope that the article would be reissued in book form?

A. No, "True" has nothing to do with the books. They don't publish books, nor have they any connection with them.

Q. Isn't "True" part of Fawcett Publications?

A. That's right, yes.

Q. And doesn't Fawcett Publications publish a well known series of paper books?

A. They do.

Q. Haven't they in fact published one of your books
310 in paper form?

A. No, they never have. There is one coming out now, but never before.

May I withdraw that? I am sorry, they did publish one of mine—a comic book. I had forgotten that completely; yes, right.

Q. And it was published by Fawcett Publications?

A. Published by Fawcett, yes.

Q. Which is the corporate name of the publisher of "True" magazine?

A. Yes.

Q. And Ralph Day is the editorial director of not only "True" magazine but of the paper books?

A. That's right.

Q. So that you actually knew about the paper series?

A. Oh, yes, sure.

Q. Isn't it a fact that Mr. Day and Fawcett Publications had told you that they intended to issue your article in book form?

A. No.

Q. And if they say—

A. Those are—may I explain at this point?

Q. Yes.

311 A. A matter of operation up there.

Mr. Martineau: Mr. Day can probably explain it.

Mr. Gertz: Yes. We do not have to have it explained at this time.

Q. If Mr. Day says that he had told you that it was going to be reprinted in book form, that is not true then?

A. He didn't tell me.

Q. With relation to the publication of your article, when did you destroy the notes?

A. When I moved to Florida, when we sold our house.

Q. When was that?

A. Some time in the fall of—we decided yesterday that it was 1951 or 1952, is that right? Whatever I said yesterday we finally pinned down.

Q. In other words, your notes were destroyed by you prior to the actual publications of your article?

A. Yes.

Q. About how long before the actual publication of your article?

A. A good year and a half, I would say. Not a year and a half; something over a year. Approximately a year.

Q. And the notes to which you have reference per-
312 tain not only to the February, 1953 article, but to the Lafayette Baker one of July, 1947 and to the Stidger article which appeared, I believe, in 1945?

A. No, Stidger I held. I have all my Stidger notes.

Q. You have all your Stidger notes, but you do not have the other notes?

A. No, nor do I have my notes on the Natchez trace story, or any of the book rights. The only one I held is Stidger, because of the fact that that was all original research from archives of the States and from historical societies; that is, it was not from any books. And so these were actual quotations from private letters and journals.

Q. So that you did not save the other notes because they weren't original?

A. No. I didn't save the other notes because I had no further use for them. I definitely had further use for the Stidger notes. They were taken originally from a book. They were sold to "True" later. I originally intended only to write a book.

Mr. Martineau: Excuse me. Did you understand the

question? He said you didn't save the other notes because they were not original.

The Witness: Oh, yes, I understood that very
313 well. I saw the glint in his eye just before that came.

By Mr. Gertz:

Q. Let me ask you, what original source of material did you use in connection with your article?

A. Which article do you refer to now?

A. We agreed—Mr. Martineau and I—that we mean your article of February, 1953, when we do not otherwise define it.

A. All right.

Mr. Gertz: Is that correct?

Mr. Martineau: Yes. Did you understand that?

The Witness: Yes.

Mr. Gertz: When I simply say "your article," without further identification, it is the February, 1953 article.

The Witness: Yes. Your question was original material. You mean outside of other books?

Mr. Gertz: I mean source material.

The Witness: Source material?

Mr. Gertz: Yes.

The Witness: Newspapers and some papers from the archives are the only things, and that could hardly
314 be called original, because I am sure it has been worked over by a great many others.

By Mr. Gertz:

Q. How many times did you read Dr. Eisenschiml's book "Why Was Lincoln Murdered"?

A. I believe twice. Once when I got it and once six years later as part of the preparation for this.

Q. How many times did you read his book "In the Shadow of Lincoln's Death"?

A. The same—twice.

Q. When did you read that book?

A. At the same time. I got the two together in Chicago from Mr. Newman and took them home and read them. In fact, I read one on the train, on the way home, and the other one when I got home, put them away and read them again as part of the preparation for the article.

Q. Did you mark passages in the two Eisenschiml books?

A. I don't believe I did. They are here, you can check it. But, as I remember, I am not in the habit of marking passages.

Mr. Martineau: Check it right now so you can answer his question.

The Witness: That's all right.

By Mr. Gertz:

315 Q. Before you go to look at it, so there will be no misunderstanding, the copies of the two books that you used are actually here?

A. They are here, yes.

Mr. Gertz: Let us mark them for identification.

A. (Resuming.) In fact, I think they have the Abraham Lincoln Book Shop stamp on them, if I am not mistaken.

Mr. Martineau: Find them and mark them. Let us not leave anything hanging up in the air.

Mr. Gertz: Mark this for identification as Plaintiff's Exhibit 1. It is a copy of "Why Was Lincoln Murdered" by Otto Eisenschiml, identified by the witness as the actual copy of the book which he used in connection with his article.

(Copy of book above referred to marked Plaintiff's Exhibit 1 for identification, 3/26/54.)

Mr. Gertz: Will you mark this copy of Dr. Eisenschiml's book entitled "In the Shadow of Lincoln's Death" as Plaintiff's Exhibit 2 for identification, being the copy of

the said book the witness says he used in connection with his article.

Mr. Martineau: Do you want him to run through 316 them—

Mr. Gertz: First we will mark it.

(Copy of book above referred to, marked Plaintiff's Exhibit 2 for identification, 3/26/54.)

By Mr. Gertz:

Q. Now, will you run through both of these documents, the two books by Otto Eisenschiml in question herein, and point out any pages or passages which you marked (handing to the witness)?

Mr. Martineau: Do you mean in the book?

Mr. Gertz: Yes, which you marked in the book.

A. You could call that a mark if you wish (indicating). That happened to be stuck in there, I noticed, and must have been put there by me to mark the place.

Mr. Gertz: Indicating Page 53.

Mr. Martineau: Of what, Mr. Gertz?

Mr. Gertz: Of Plaintiff's Exhibit 2 for identification.

By Mr. Gertz:

Q. There is a little portion of a yellow paper—

A. None whatever in that that I can see.

Q. And none in Plaintiff's Exhibit 1. So that you have examined both of the said Eisenschiml volumes and 317 you find no markings of any kind?

A. That's right.

Mr. Martineau: You mean, except as—

Mr. Gertz: Except one little piece of paper stuck in the "Shadow" book.

Q Now, are those the only two copies of Dr. Eisenschiml's books that you used at any time?

A. They are.

Q. Did you write out any notes with respect to those two books, or either of them?

A. Quite probably, but I can't recall any detail on that at all.

Q. Do you recall about how many notes?

A. I can't even recall for sure today that I did. I say probably I did, but that—

Q. In other words, it is quite possible that in that red box containing your notes there may have been no notes with respect to the two Eisenschiml books?

A. There may have been none. I rather think there were, but I am completely hazy.

Q. And you have exhausted your recollection as to whether or not there were any?

A. Yes.

318 Q. So that if I asked you about any particular passages in the Eisenschiml books, you wouldn't presently know whether or not you had made a note with respect to those passages?

A. I probably wouldn't. I might—something might click.

Q. In other words, now and then you might recall, but as of this moment you couldn't pick out any passage in the Eisenschiml books and recall the note you made?

Mr. Martineau: Before answering that question, do you want to look at the books?

The Witness: No, I don't think it would help me any.

Mr. Martineau: All right.

Q. When did you originally see Exhibit C attached to the Eisenschiml affidavit?

A. What is Exhibit C?

Q. That is the list of 66 parallel passages about which Mr. Martineau examined you yesterday.

A. They came to me in two groups. Photostatic copies were sent to me in Florida at different times. I cannot recall the times, and I don't think I have my correspondence here—wait a minute, wait a minute.

Mr. Martineau: Excuse me. He is asking you about this Exhibit C, this very document, when you first
319 saw that; is that right?

Mr. Gertz: That is right.

The Witness: This very document here?

Mr. Martineau: In other words, Exhibit C, Dr. Eisenschiml's affidavit, is what you wanted to know about first, I take it.

The Witness: It was given to me approximately three weeks ago.

By Mr. Gertz:

Q. Isn't it a fact that some weeks before that you were given another list of parallel passages?

A. Yes, I was sent up a—.

Q. Which was identical to the list included as Exhibit C of the document given to you about three weeks ago?

A. Not complete; that was only a partial list.

Mr. Martineau: Weren't there two lists sent to him? We will stipulate to that, that you sent two lists, I think, at different times, and we will stipulate that those were sent to the witness.

Mr. Gertz: Yes, at or about the times they were received by counsel for defendant?

Mr. Martineau: Correct, that's right.

By Mr. Gertz:

320 Q. When you got those lists, did you attempt to recall any notes you had made from the Eisenschiml books?

A. I did, and I made quite an effort to. It was considerable of a shock to me, and I was hampered by having only a small number of these books down there, and having almost no access to any other, because Lincoln material is notoriously absent in this other library. So I was helpless.

Mr. Martineau: You say down there—

The Witness: I mean in Florida.

By Mr. Gertz:

Q. In other words, this isn't the first time you have been asked questions with respect to notes taken from the Eisenschiml books; you have had some weeks now to go over the books.

A. Yes.

Q. To think in terms of refreshing your memory of those?

A. That's right.

Mr. Martineau: Did he?

Mr. Gertz: He said that's right.

Q. When did you first learn that a claim was being made that your article infringed Dr. Eisenschiml's books?

A. Roughly, as I recall, it was some time last summer when I came to New York. I was here on a trip and 321 was told by Fawcett about it. I believe that was—

Q. Would you place it more exactly?

A. Only that I came here in June and stayed through September, so it was some time within that period, and, as I recall, it was about the time I arrived here, so it must have been the end of June or the first part of July.

Q. Isn't it a fact that immediately following the publication of your article, claim was made that the article infringed the copyright of Dr. Eisenschiml?

A. That I don't know.

Q. Did you personally receive any letters from anybody setting forth such contention or claims?

A. Yes, I received either two or three letters of that type over a period of time following publication. I believe there were three. There may have been only two.

Q. From whom?

Mr. Martineau: It is understood that I have the same reservation in regard to the materiality of your cross-examination?

Mr. Gertz: Yes.

Mr. Martineau: I regard that last question as utterly immaterial and as introducing false issues in the case, as to what other people may have said as regards claims,
322 and so forth.

Mr. Gertz: You will see the materiality in a minute.

By Mr. Gertz:

Q. Did Fawcett Publications also tell you that they had received similar letters?

A. No, they forwarded one with a note saying, "Here is the first beef we have received. Will you do something about this guy?"

Q. Was this the Mason letter?

A. That I don't recall.

Q. So that actually since the time of the publication of the article in February, 1953 issue of "True", the subject of possible infringements has been on your mind?

A. No, I wouldn't say it has been on my mind. I was highly indignant, and I don't think I considered it as a matter of worry, because you have got a certain number of crack-pot letters in response to publications of anything, and I put them in that kind of category.

Q. Did you see the letter that Mr. Day sent to one Charles E. Mason?

A. Is that the one, a photostatic copy of which is here?

Q. Yes.

323 A. If it is, I saw the photostat. I didn't see the original letter.

Q. When did you see the letter of February 27, 1953 originally?

A. About three weeks ago, when I saw this.

Q. Did you have any discussion or correspondence with Mr. Day or with anyone else with respect to the letter of February 27, 1953 before it was sent out?

A. No.

Mr. Martineau: I am going to object to any correspondence between the witness and Mr. Day. It is utterly immaterial. He has answered anyway.

Mr. Gertz: Yes.

Mr. Martineau: All right. My objection still stands.

Q. Will you please read the said letter of February 27, 1953, which is a part of Paragraph 24 of the Eisenschiml affidavit?

A. I know I was struck—

Q. There is no question before you. I am just asking you—

Mr. Martineau: Do you mean read it to himself?

324 Mr. Gertz: Yes.

Mr. Martineau: Familiarize yourself with it.

The Witness: All right (examining).

By Mr. Gertz:

Q. Is there anything within that letter which is incorrect?

A. Yes, definitely.

Q. What is it?

A. Paragraph 3, the first sentence, "Mr. Millard did considerable research in the Eisenschiml library and in private files for his research on this piece"—that I did not do.

Q. And that is the only thing in the letter that is incorrect?

A. I would say—no, wait a minute.

Q. Read it carefully, Mr. Millard.

A. I am still bothered by the use of that word "credit," where he says, "the original manuscript from which 'True' made selections for publication did credit Dr. Eisenschiml," that word "credit" is used differently among the editorial people as—in the sense that a footnote or a bibliography is a credit for a source. Now, in

this case I guess I did credit Dr. Eisenschiml with the source of something which was cut out.

* * * * *

325 Q. What I had reference to, so that there will be no misunderstanding, is that nowhere in your 326 article or in your manuscript, Defendant's Exhibit 2 for identification, do you generally credit or generally pay your respects to Dr. Eisenschiml?

A. Only in the wording.

Q. Which wording?

A. On Page 58—and I quote—"Otto Eisenschiml, probably the world's leading authority on the mysteries of the Lincoln assassination."

Q. Yes.

A. That is a general credit.

Q. Yes, but other than that, there is nothing else in the whole—

A. No, nothing.

Mr. Gertz: Is that contract Exhibit 3?

Mr. Martineau: Yes. Do you have your copy there?

Mr. Gertz: Yes.

Q. I show you a document heretofore marked for identification as Defendant's Exhibit 3, and ask you to examine it (handing to the witness).

A. Yes.

Q. Now, prior to the execution of the document, had you had any correspondence on the subject of your 327 article with "True"?

A. Prior to when?

Q. The execution of Defendant's Exhibit 3 for identification.

Mr. Martineau: Bearing date January 30, 1952.

A. I had general correspondence with the editor, Tom Naughton, over the progress of it, and I believe I sent him a note and said, "I am getting along fine, but it is

going to take me longer than I thought," or something to that effect; not correspondence of any import, just Tom and I exchanged casual chatty notes in the course of work anyhow.

Q. So that if the defendant said there was no correspondence prior to the publication of the article, it is mistaken?

A. Well, yes, in the strictest sense of the word, probably. Now, I am not even sure of this. I say it is customary for me to drop notes back and forth with the editor on a personal basis since I have known him a great many years before he went with "True". So if it were anything at all it would be one of those notes which neither one would remember or save, I am sure.

Q. When was the first time you discussed or cor-
328 responded with anybody connected with the defendant with respect to doing an article on the assassination?

A. As I recall—

Mr. Martineau: Pardon me. Just read that question, please.

(Pending question read by the reporter.)

Mr. Martineau: All right, I have it.

A. My discussion was by telephone some time in the spring of 1951, but as to when, I can only date it back by fixing the fact that it took me a little over four months to deliver the manuscript, and it took them—well, wait a minute; I am going to get this now. I would say it would be right around the first of June, 1951.

Q. All right. Now, did you ever, prior to the publication of the article, have any correspondence or conversation with Ralph Day with respect to it?

A. No.

Q. So that your sole correspondence or conversation

was with Tom Naughton? The reporter doesn't get your nods.

A. My answer is yes.

Q. I show you Defendant's Exhibit 2 for identification, being the manuscript of your article, 135 typewritten pages reduced to 119 by pencil, and ask you to examine
329 it (handing to the witness).

Referring only to the passages in the manuscript which were cut out by the defendant, were any of those cut out passages copied from Dr. Eisenschiml's books?

A. Yes.

Q. You are quite sure?

A. That I am quite sure of, since with the exceptions I brought out last night no passages were copied from Dr. Eisenschiml's books. I can answer that very clearly.

Q. Turn to manuscript Page 7, the passage beginning "What did Ward Lamon know or suspect that he never revealed". Where did you get that material?

A. I have no idea now.

Q. I call your attention to Page 21 of the "Shadow" book—

Mr. Martineau: Plaintiff's Exhibit 2.

Q. —Plaintiff's Exhibit 2 for identification.

Mr. Martineau: He has a copy.

The Witness: Yes.

Q. Isn't it a fact that you got that material there, Page 21 of Plaintiff's Exhibit 2?

A. Not consciously, but we have identically the same sentence here.

330 Q. On Page 7 of the manuscript, the passage beginning "There had been for example, the scheme of Confederate Scout Thomas N. Conrad to kidnap Lincoln * * *"—going on to the sentence "Conrad was convinced that no one of his party had betrayed him"—

Mr. Martineau: That is from Defendant's Exhibit 2?

Mr. Gertz: Yes, Defendant's Exhibit 2 for identification.

By Mr. Gertz:

Q. Where did you get that material?

A. I don't know.

Q. The answer is you don't know?

A. I don't know.

Q. Turn to pages 12 and 13 of Plaintiff's Exhibit 2. Have you examined those two pages?

A. Yes.

Q. Isn't it a fact that you got the material from those pages of Plaintiff's Exhibit 2?

A. I am afraid I can't say. I don't know.

Q. Now turn to Page 8 of the manuscript, Defendant's Exhibit 2, the passage "The police and the papers identified the disturber as a drunken lunatic named Thomas
331 Clemens"—where did you get that?

A. I am trying to think, because I ran across that—

Q. Yes, you—by the way, if my standing up bothers you—

A. It doesn't.

Q. Because every once in a while I am standing.

A. I am not bothered by anything.

Mr. Martineau: As a matter of fact, we are supposed to stand up.

Mr. Gertz: Because I find it a change of pace when I stand up sometimes.

Mr. Martineau: I was writing another note. Read that last question and answer.

(Read by the reporter.)

Mr. Martineau: He had not finished when you interjected.

By Mr. Gertz:

Q. Do you know what question is before you now, Mr. Millard?

A. Yes, I do.

Q. Well, will you answer it?

A. May I check something here?

Q. Oh, surely.

332 A. I have a vague feeling that probably it is wrong, but something I have been reading within the last four or five days—I ran across that—and I have not even opened these books since the time of this—

(The witness examined the papers.)

Q. Tell me when you are ready, Mr. Millard.

A. This I see is a false lead, as I suspected.

Q. Referring to one of the books in the pile?

A. Yes.

Mr. Martineau: The question is where did he get that, is that right?

Mr. Gertz: Yes, that's right.

A. (Resuming) Where I ran across this—this is not where I got it—where I ran across it, now that I refresh my memory, in Washington, Page 368.

Q. Will you read the passage in question?

A. "After the newly elected Senators had been sworn in, the dignitaries lined up for the procession to the east front of the Capitol. There progress through the rotunda was barred by the Capitol police who held back the crowd which, in spite of orders to the contrary, had gained access to the hallways. After the President had passed, a man broke through the police line and started toward the

333 inauguration platform. He was seized by Lt. Westfall of the Capitol police. There was a scuffle. The east door was slammed shut and police hustled the intruder off to the guard room. The incident was not taken seriously at the time, for the man was released as soon as the ceremonies were over. Cranks were common in Washington. The next day the military authorities looked into the case of a libidinous lunatic named Thomas Clemens who said that he had intended to kill the President on inauguration day".

Q. Now—

A. That is not my original source. That is only where I said—

Q. In other words, you did not actually get that originally from that book, but in reading the last few days you have seen it?

A. Yes.

Q. When was that Margaret Leach book published?

A. 1941.

Q. Which was after "Why Was Lincoln Murdered"?

A. Yes.

Q. Do you know whether or not Margaret Leach credits Otto Eisenschiml for that material?

A. No, I don't.

Q. Do you know where the Thomas Clemens ma-
334 terial appears in source form?

A. No, I don't.

Mr. Martineau: If you will tell us the first one, we will stipulate to whatever is the fact. Did she? I mean, just to save you time, if the Doctor says she did credit him, why, I will certainly stipulate to it. Do you see what I mean, Doctor?

By Mr. Gertz:

Q. Turn now to Page 9 of the manuscript, Defendant's Exhibit 2.

A. Yes.

Q. The passage beginning "All was in readiness" and going on to "Why is there no mention of the affair in any known War Department records"?

Where did you get that?

A. I can't tell you.

Q. Will you look on Page 14 of Plaintiff's Exhibit 1—

Mr. Gertz: Do you have any objection if Dr. Eisenschiml gives the particular line so we have it marked? It will save time.

Mr. Martineau: No.

Dr. Eisenschiml: What pages?

335 Mr. Gertz: I refer to the "Shadow" book at Page 14.

Mr. Martineau: You said Plaintiff's Exhibit 1. You meant Plaintiff's Exhibit 2?

Mr. Gertz: Yes, Plaintiff's Exhibit 2, Page 14.

By Mr. Gertz:

Q. And also in that same volume—

Mr. Martineau: Was Page 14 the first one?

Mr. Gertz: Yes, Page 14.

Q. And in that same volume of the "Shadow" book, Pages 362 and 363. Now, turn to the other book, Plaintiff's Exhibit 1 for identification, Pages 44 and 45. Have you looked at all the passages?

Mr. Martineau: Have you read them?

The Witness: Yes.

Q. Do those refresh your recollection as to where you got the material on Page 9 of your manuscript?

A. No, not particularly.

Q. Isn't it a fact—

A. They refresh my recollection of their being there, my having read them there.

Q. Isn't it a fact you got the material from the 336 Eisenschiml books?

A. It is a possibility, but I would not say a fact. I am quite positive there is another—there are other sources, and may have come from any of them.

Mr. Martineau: Pardon me—

A. (Resuming.) I have a hunch now—

Mr. Martineau: Go ahead; I am sorry.

A. I have a hunch now there are other sources.

Q. Do you want to state them?

A. I think Sandburg. He goes into great detail, as I remember, on several earlier plots from one of his books.

Q. Yes. Now, on Sandburg, you are referring to the War Years; you do not mean the Prairie Years?

A. The War Years.

Q. Those are the four volumes. Do you remember when those four volumes were published?

A. Those were about 10 years after the Prairie Years, I believe, which would make it 1936. Is that it?

Mr. Martineau: Can we stipulate on it?

Mr. Gertz: Published in 1939.

By Mr. Gertz:

Q. That was after the publication of "Why Was Lincoln Murdered"?

337 A. Yes.

Q. You say you read every word of the four volumes of the Sandburg biography?

A. Yes.

Q. You read, I take it, then Page XVII of the forword?

A. Undoubtedly.

Mr. Martineau: Look at it.

Q. I call your specific attention to the following words: "The liberal researches of Otto Eisenschiml on the closing scenes of Lincoln's life are a distinct contribution; his failure to prove the main implied thesis of his book 'Why was Lincoln Murdered (Little-Brown 1937)' does not invalidate his other work in revealing the melancholy role of the muddle of John F. Parker and of other figures in drab."

Mr. Martineau: Do you want us to stipulate that that is in Sandburg? We will.

Mr. Gertz: Yes.

By Mr. Gertz:

Q. And you read it prior to doing your article?

A. Undoubtedly, yes.

Q. So that you knew Sandburg derived that material from Dr. Eisenschiml and credited Dr. Eisenschiml?

338 A. On Parker, yes. I would have known—he doesn't specifically refer now to these later things that you have brought up, but I will take it for granted that—

Q. Do you know who Sandburg referred to when he mentioned the other figures in drab?

A. I would guess he refers to all conspirators or suspected conspirators who attempted to harm Lincoln in one way or another.

Q. Including Louis Wiechmann.

Dr. Eisenschiml: W-i-e-c-h-m-a-n-n.

Mr. Gertz: There is a note in the Eisenschiml books about the spelling.

The Witness: Of course, he is a little less obscure than some of the others, having gotten in the testimony and at the trial.

Mr. Martineau: May I make one thing clear? Some of the questions you asked the witness were "Did you get that from Dr. Eisenschiml."

Mr. Gertz: "Did you copy it?" Whenever I say "get" I mean "Did you copy it from Dr. Eisenschiml".

Mr. Martineau: Do you understand that?

The Witness: Yes.

339 Mr. Gertz: Copy in the sense of get, derived, take, pirate, infringe.

Mr. Martineau: In other words, did you mean to include the idea his having first been inspired by Dr. Eisenschiml?

Mr. Gertz: Not inspired, but whether that was the source for his statement.

Mr. Martineau: The source?

Mr. Gertz: That is right, just the source.

Mr. Martineau: I want to get that straight in my own mind. Do you mean did he actually lift or copy it verbatim, or close to verbatim?

Mr. Gertz: That is partly argument, but I want to know if he derived it from him.

Mr. Martineau: I want to make sure he understands.

By Mr. Gertz:

Q. Do you have any difficulty in knowing what I mean?

A. I take it for granted—maybe I shouldn't be quite so naive about it, but I am taking it for granted that I know what you mean and go along on that basis.

Q. I regard myself as a writer, too, so I try to be
340 as explicit as I can cross-examining you as a lawyer or a writer.

A. I think I understand your point on it anyhow.

Mr. Martineau: I just want to make sure you understand it.

Mr. Gertz: I assure you that I am not trying to trap him or put words in his mouth. I am just trying to get the matter straight.

341 Mr. Martineau: I know.

By Mr. Gertz:

Q. When you mentioned during the course of your testimony that you derived certain things from Sandburg, did you mean things which Sandburg in turn derived from Otto Eisenschiml?

A. If it was a case where he did, yes.

Q. Could you give instances where Sandburg was your authority and you did not derive it from Otto Eisenschiml?

A. Well—

Mr. Martineau: Pardon me. In that case I would suggest that you look at all your notes you used yesterday in your testimony, check everyone for every reference he gave to Sandburg, check Sandburg and see if he used Dr. Eisenschiml. That is the only way he can answer the question. Otherwise we are just guessing.

Mr. Gertz: Yes, because I will tell you, without arguing the matter, the so-called Sandburg records are Sandburg with permission of Otto Eisenschiml.

Mr. Martineau: Let us get the facts, whatever it is.

342 The Witness: May I interpret a point on my method of operation and make this a little clearer?

Mr. Gertz: Yes.

The Witness: In my reading, as I said, all the books I could lay my hands on in the beginning preliminary to the writing, I set aside incidents that in my mind I felt would move the story forward toward the goal I was seeking. Then in reading, I believe without exception—with no exception except in Dr. Eisenschiml's case, did I use anything that I didn't find in at least two and usually four different sources.

Now, whether they credited one another or not, that was not the point; nor was I concerned with it. Where I found an item only in one source, the only two cases where I used that was in quotation from O'Beirne papers and the use of the Camden and Amboy schedule. Those were the two things which I don't believe were mentioned anywhere else.

Mr. Martineau: Anywhere else other than what?

The Witness: Dr. Eisenschiml's book. But when I
343 ran across the same story appearing in substantially the same form in two or three or four books, I considered it a part of history, and whether I took my interpretation from one book or another, I couldn't say. I think I took it from all.

By Mr. Gertz:

Q. Let me get this matter clear. I am not trying to be cute, I assure you.

A. No.

Q. Did you believe that because a particular author derived material from Eisenschiml, which he credited to Eisenschiml, that thereupon you had the right to use it in your article?

Mr. Martineau: I think I will object to that question. It is quite misleading.

The Witness: Yes, it is—

Q. Did you think—

Mr. Martineau: Pardon me just a minute, Mr. Gertz. Is the other question withdrawn temporarily, because he was starting to look for any instance he may have used.

By Mr. Gertz:

Q. Was it your understanding of your rights as a
344 writer that if material which appeared originally in Eisenschiml's books was used in a subsequent work, that you had the right to use the same material?

Mr. Martineau: You mean, whether it was a matter of historical fact or recitation of fact, or what?

Mr. Gertz: I have reference to any kind of material which appeared first in Eisenschiml.

Mr. Martineau: Again, Mr. Gertz, when you say "use the material," you mean use it in Haec Verba or use it in historical facts?

Mr. Gertz: Use it in Haec Verba for substance or any part of it.

Mr. Martineau: Now we understand.

Mr. Gertz: Do you understand my question?

The Witness: Yes, I do.

Mr. Gertz: I want to see if he understands what his rights were. I think that is legitimate.

Mr. Martineau: Yes.

The Witness: Yes. My understanding has been, and I am afraid still is, peading change, that any incident of history affecting h. ry, a part of history, which is generally written about by several writers is a fact of history
345 which is available to all and open to all, regardless of what person may have first ferreted it out, because I can't believe—I never believed—that a man can stifle history through the fact of having discovered it.

If on the other hand, it is an item like the O'Beirne papers or like the Camden and Amboy Schedule, it is a particular piece referring to history, it is a particular bit of knowledge

referring to history, which Dr. Eisenschiml got with considerable effort and expense, that until such time as that is generally written into popular history, it is somewhat his property.

By Mr. Gertz:

Q. Do you understand that—

Mr. Martineau: Pardon me, I don't want to butt in on your examination, but we still have this question pending.

Mr. Gertz: Yes.

Mr. Martineau: On the question of whether he used Sandburg in any instance, let us get that closed.

Mr. Gertz: I think you are right. I didn't mean to 346 run away with that.

Mr. Martineau: No, I know how it is. I do the same thing myself. Sometimes you change over to other interesting ideas.

The Witness: Volume 4 must be—here it is.

Mr. Martineau: Do you understand the question?

The Witness: Yes. May I see one of the—

Mr. Gertz: Wait. Off the record.

(Discussion off the record.)

The Witness: I say that is a hard thing to say, because, as I remember, Sandburg gave only a blanket credit, so it would be hard to say that any specific instance was or was not credited to Dr. Eisenschiml. It would be an arguable point, I think.

Mr. Martineau: By blanket credit—if you pardon the interruption—you mean the credit which you read where Sandburg did credit Dr. Eisenschiml?

The Witness: Yes, where he had.

Mr. Martineau: Whatever he said—

The Witness: He made up a similar draft, or something like that.

Mr. Gertz: Where we have the exact language as 347 the credit.

The Witness: I rather think, however, there are some that couldn't possibly come under that way.

By Mr. Gertz:

Q. Would you now pick out the Sandburg sources that you used?

A. May I have a copy of the 66?

Q. I want those which do not come with the credit given by Sandburg to Eisenschiml.

A. Yes.

Mr. Martineau: 36?

The Witness: No. May I have a copy to see what I will have to check and see, so I know what I am looking for on which part?

The matter of Julia Grant being publicly humiliated by Mrs. Lincoln.

Q. Give the number.

A. Quote 8.

Mr. Gertz: That is of Exhibit C of the Eisenschiml affidavit.

A. (Resuming) That I would say definitely is not—would not fall under the credit to Dr. Eisenschiml.

Q. Is there any other?

348 A. Because it is a general—so generally known.

Mr. Martineau: Let us get that straight. You mean your authority for Quote 8 is Sandburg's; is that right?

The Witness: Yes, it is at the moment—it is one of the authorities. I have four here.

Mr. Martineau: That is one Mr. Gertz is interested in right now. Your feeling is that Sandburg in that instance did not credit Dr. Eisenschiml with that particular thing?

The Witness: Yes.

Mr. Gertz: May I make the suggestion, Mr. Millard: in answering questions, it should be yes or no, and no equivalent like "ah ha" or anything like that.

Mr. Martineau: Wherever possible.

Mr. Gertz: Yes, wherever possible.

The Witness: I would guess that in the case of Quotes 13, 14 and 15, regarding the life of Parker, the details on Parker, that probably comes under Dr. Eisenschiml's credits. I would guess so; I don't know. But it would be more likely to.

349 Mr. Martineau: I do not want to be butting into Mr. Gertz's examination, but what you mean is that one of the sources you used for those quotes was Sandburg, and there you feel that Sandburg undoubtedly credited Dr. Eisenschiml?

The Witness: Yes.

Mr. Martineau: I see.

Mr. Gertz: In 13, 14 and 15.

By Mr. Gertz:

Q. And that would be true wherever Sandburg used Parker material?

Mr. Martineau: Isn't that a matter of argument, Mr. Gertz?

Mr. Gertz: No. I may ask him some more questions.

A. It probably is true. Though those records have been available in the past, I guess there is no record of anyone else ever using them.

Q. Isn't it a fact that nobody, prior to Dr. Eisenschiml, gave the Parker story in detail?

A. In detail, I think that is true, yes.

21 is the coachman Burns and Forbes, Parker going out for a drink. That I would say does not come under that way, because I am positive that that has been mentioned 350 by others, hasn't it?

Q. By whom?

A. It hasn't? Well, I don't know. There I am back in my memory, and I have a feeling I undoubtedly encountered that.

* * * * *

351 The Witness: I will. Regarding the Quote 21—

Mr. Gertz: Of Exhibit C of the Eisenschiml affidavit?

The Witness: Yes.

Mr. Martineau: We have stipulated that, too.

The Witness: Yes.

Mr. Martineau: When we say "q-u-o-t-e" by the numbers we refer to Exhibit C of the Eisenschiml affidavit as we did yesterday; is that right?

Mr. Gertz: Yes.

Mr. Martineau: Good.

The Witness: I had thought that this would not—that Quote 21 would not fall under the Eisenschiml credit in the Sandburg book. In this I may be wrong. This is merely an opinion.

This is Parker again, so I would say that comes under the—

Mr. Martineau: Which quote are you referring to, Mr. Millard?

The Witness: I am referring to Quotes 34 and 34A, which are in reference to Parker, and I imagine they fall under the Eisenschiml credit.

352 Mr. Gertz: In the Sandburg book?

Mr. Martineau: Yes, agreed. What you mean is that if they do not fall under it, they should fall under it?

The Witness: Yes.

Mr. Gertz: Off the record.

(Discussion off the record.)

The Witness: As I have said, I have never heard of its being used by anyone prior to Dr. Eisenschiml. But, as I said, the record must have been available.

The last is Quote 42 regarding Paine's strength to be pitted against that of Lincoln. That I would say, with no authority, would not come under the Eisenschiml credit

in the Sandburg book. I wouldn't know, I wouldn't have any way of knowing, but I would guess that was a little more generally used.

Mr. Gertz: Yes.

By Mr. Gertz:

Q. Does that complete it?

A. That completes my Sandburg references.

Q. Is it your understanding that when one or more history books refer to factual material, that you have
353 the right to use that factual material without looking at the original sources?

A. I wouldn't say one—well, one or more. I wouudn't —I would say three or more is my sort of unwritten rule on it, without any basis. It is just a number in my head.

Q. So that there will be no misunderstanding, suppose you saw in the Eisenschiml book certain facts set forth, any facts set forth, with respect to the assassination—

A. Yes.

Q. —and you have a recollection that in one, two or three other books you have seen some of those same facts set forth, is it your understanding that you may use that factual material in your writing?

A. It is. And I would like very much to have that point definitely cleared before this is over.

Q. So that you understand that you do not have to look at the actual sources?

A. Yes, though I prefer to.

Q. Yes. And isn't it a fact that in almost every instance you did not look at the actual sources, but you simply looked at the secondary references to them?

Mr. Martineau: Just a minute.

A. No, I wouldn't say that.

354 Q. Let me be specific. Suppose, for example, in Bate's book, "The Diary of a Rebel War Clerk," there is a reference, as you testified to yesterday, with respect

to news of the assassination in the Richmond Whig, is it your understanding that you may use that material without looking actually at the Richmond Whig?

A. Yes.

Q. And that where a secondary work, whether Eisenschiml or anyone else, refers to any newspaper of a particular date, it is your understanding that you do not have to look at the particular newspapers of that date?

Mr. Martineau: Mr. Gertz, do you mean where the original work that you start off with in your question is presented as a matter of fact and history?

Mr. Gertz: That is right.

Mr. Martineau: I just want to make sure that we all understand that.

Mr. Gertz: Of course, you and I will have a legal argument on that later.

Mr. Martineau: That is right.

Mr. Gertz: But I wanted to know if it is Mr. Mil-
355 lard's understanding, because that will determine from a legal viewpoint whether or not there was copying, whatever he may have thought of his rights and privileges and immunities.

The Witness: Well, I would say in answer to your question that publication in a newspaper primarily would automatically make it public property, regardless of what may have become of that newspaper subsequently, that when first published, it was published for the purpose of making it available to all people as a part of the news.

Q. Yes. So that there will be no misunderstanding, I want to phrase this—it may be in form hypothetical but it refers to a specific situation—assuming, as we can from your testimony yesterday and today, that in the Eisenschiml books you found references to newspapers of specific dates and places, is it your understanding that you may refer to the same newspapers of the same dates without

actually going to those newspapers and verifying what Dr. Eisenschiml has said with respect thereto?

Mr. Martineau: Do you mean, using it in Haec Verba?

Mr. Gertz: In any form: Haec Verba, or in essence, or in part.

356 Mr. Martineau: I see. You are not discussing the form of the expression, just the ideas contained therein?

Mr. Gertz: Yes.

Q. To be specific now—we will consider it part of the same question—

Mr. Martineau: Maybe it should be a more specific question.

Mr. Gertz: I think it will be helpful if we get the general idea, because I do have later some specific questions on that.

By Mr. Gertz:

Q. Suppose, to be exact, that Dr. Eisenschiml refers to issues of the Richmond Whig of a specific date, giving either the substance or direct quotations therefrom, is it your understanding that you have the right, without consulting the original newspapers, to utilize the material that appears in the Eisenschiml book with respect thereto?

* * * * *

245 Q. I want you to answer this as of your state of mind, or your understanding, as of the time you wrote the article.

A. Yes. On one side you have the fact that I would, if it was humanly possible, want to see the original source, simply because I do. I am trying to imagine or trying to remember any case in my experience where I might have reacted the other way, might have quoted a newspaper that I hadn't actually seen.

Q. You didn't actually see the Richmond Whig, did you?

A. No, no.

Q. Now,—

A. No, nor did I quote it, you see, except as to mention a date. I believe that was in terms of dating.

Q. Let me ask you this: Is it a fact that in the Eisenschiml books there are references to quotations from and summaries of a large number of newspapers?

A. Yes.

* * * * *

359 Q. Will you turn to Pages 10 and 11 of the manuscript, Defendant's Exhibit 2?

Mr. Gertz: We will stipulate that when we refer to "the manuscript" we mean the manuscript of the article in controversy.

Mr. Martineau: Right. It is so stipulated.

A. I had—

Q. Are you looking at it?

A. Yes.

Q. All right. Now, I am referring specifically to the passage "Did Lincoln Himself Know or Guess His Fate? There is more than a hint that he did * * *."

* * * * *

360 "And a few days before walking out of the office of Secretary Stanton, Lincoln and his guard Thomas Pendel met a heavy stranger."

Do you know where you got that language or material?

* * * * *

The Witness: Yes, I have. I can't answer it. Here again, I have a feeling that somewhere in the back of my mind there are sources for that, but I can't pin them
361 down. You see, I have a chance to refresh myself partially on the points here, but on the others they are coming at me cold after a long period of time.

Mr. Martineau: Excuse me. By "the points here," you mean the 66 points of Exhibit C?

The Witness: The 66 points, yes. I had an opportunity to at least renew some of my—

Mr. Gertz: Yes.

By Mr. Gertz:

Q. Now look at Page 19 of Defendant's Exhibit 2—

Mr. Martineau: You mean Plaintiff's Exhibit 2?

Mr. Gertz: Yes.

A. (After examining.) Yes, I see this now.

Q. Have you read that Page 19 from Plaintiff's Exhibit 2?

A. Yes.

Q. Does that refresh your recollection as to where you got the material?

A. No, it doesn't.

Q. Isn't it a fact that you got it from Page 19 of Plaintiff's Exhibit 2?

A. Not necessarily.

362 Q. Turn to Page 17 of the manuscript, the language reading "Grant fled * * *"

"Were Grant at the theatre there would have been military guards, a detail of alert sentries. No one could have boldly walked into the State box unchallenged and unnoticed."

Where did you get that?

A. I have a sneaking hunch probably that is Dr. Eisenschiml's inspiration. As I recall now, I think probably it was.

Q. Will you look at Page 63 of Plaintiff's Exhibit 1? Isn't that where you got it?

A. It could be. It could very well be. I can't say for sure, but it is a possibility I am willing to admit.

Q. Turn to Page 32 of the manuscript.

Mr. Martineau: Do you mean the pencil paging?

Mr. Gertz: By the way, I will say this for the record, when I refer to a page number, it is the pencil number

where there is both pencil and type. Where it is only typed then it would be that number. In other words, where there are two numbers in both type and pencil, then it is a pencil number. If it is only one number, then it is that particular number.

363 By Mr. Gertz:

Q. Have you got that?

A. Which one?

Q. Here is the passage I have reference to:

"The first plot * * *."

"Set for early January, 1865 * * *."

"Lincoln was to be seized enroute to the Navy Yard and subdued by Payne. Confederates in stolen Federal uniforms would whisk the carriage past the sentries on the bridge and escort it on the 36 mile dash to Port Tobacco where Azerodt's boat waited. Relays of fresh horses were posted at intervals. A second band was to follow stretching ropes and felling trees across the road to block pursuit * * *."

"A squadron of Mosby's raiders * * *"

"To strike at any Union cavalry * * *"

"It was an almost perfect plan covering every conceivable exigency, except one directive, an unseasonable thaw accompanied by torrential rains turned the road south to impassible quagmires. The plan had to be abandoned."

Mr. Martineau: Where is "the plan had to be abandoned"? When you read that, you didn't read the manuscript as it appears here. You skipped a lot of it when
364 you said "skip marks."

Mr. Gertz: I indicated the skip marks.

Mr. Martineau: I just wanted to make that clear. The skip marks do not appear in the manuscript, do they?

Mr. Gertz: Yes. Where either Mr. Martineau or I refer to skip marks, we have reference to our own skipping of

portions, and not to anything that we read in the manuscript or in the books.

Mr. Martineau: That is correct.

Mr. Gertz: That has been true throughout the hearings.

Mr. Martineau: Right.

By Mr. Gertz:

Q. Do you know where you got that that I just read?

A. May I refer to a book here for a moment?

Q. Surely.

A. I don't know, but I have to reach and fumble—

Mr. Martineau: You mean you do not know until you refer to a book?

The Witness: That's right. All I know is what I read in the books.

I have to be awfully vague, and I may be possibly 365 wrong, but I have a dim memory that that came from some books specifically on Booth.

Q. Which ones; do you know?

A. I don't know which ones. I read—

Q. Or the source of the material in those books you do not recall either?

A. No, I don't. I read Foster, and I read "The Mad Booths of Maryland" and "One Mad Act," and everything from the Booth side, everything I could get on Booth, and I just have the feeling that in there was a source of some of that, but I am not sure.

Q. In other words, just a vague feeling; you do not really recall?

A. No.

Q. Will you turn to Pages 10 and 11 of Plaintiff's Exhibit 2 and see if they refresh your recollection?

A. I have already looked and they—

Q. You have what?

A. My feeling is still the same, that originally I got this from the Booth side.

Q. Isn't it a fact that you got that material from the Pages 10 and 11 in that Plaintiff's Exhibit 2?

A. I don't recall it that way. This is not a denial,
366 but I don't recall that I did that.

Q. Are you through with your answer, Mr. Millard?

A. Yes.

Q. All right. Now, turn to Page—

Mr. Gertz: By the way, if I cut him short you cut me short.

Mr. Martineau: That is all right. We are all just after the facts here.

Q. Turn to Page 38 of the manuscript. I refer to this language: "And that is all we know. There are no clues of where Mary Lincoln found John F. Parker or why she chose a man of his character * * * for that service."

Where did you get that?

A. One source I think—

Mr. Martineau: Where did he get what?

Q. Where did you get that material, that language?

Mr. Martineau: Are you talking now about the language, not the idea? All you have quoted is a question.

Mr. Gertz: I have reference to the idea, to the language, to the words.

Mr. Martineau: Where did he get the idea of asking the question; is that what you mean?

367 By Mr. Gertz:

Q. Where did you get the idea and the language? I have reference to both.

A. That language I would consider my own, but the source for—it is not in the form of a question here—the source of the material—one place, I think, our friend Sandburg suggests the fact that that isn't known, and there is another source of—I don't remember at the moment which one—but I recall that it also included the remark that Mrs. Lincoln seemed to have taken over the duties of hir-

ing and firing the White House guards and had exercised that authority a few days before, and it may have been just an arbitrary act. What source that is, I don't know.

Q. Isn't that the Eisenschiml book, Plaintiff's Exhibit 1?

A. No, I don't think so.

Q. Will you turn to pages 14 and 16 of Plaintiff's Exhibit?

A. I will tell you why I don't think it was, because this is one I have run across the last couple of weeks again, and I have not opened these books since this started.

Mr. Eisenschiml: The last line on page 14.

The Witness: Fine.

368 Mr. Martineau: Which exhibit?

Mr. Gertz: Plaintiff's Exhibit 1.

Mr. Martineau: The one "Mrs. Lincoln quickly—", is that the one?

Mr. Eisenschiml: No. "What prompted—"

Mr. Martineau: I see. "What prompted—"

The Witness: Yes.

By Mr. Gertz:

Q. Does that refresh your recollection?

A. No. There is no particular similarity there.

Q. Did you look at the whole reference?

A. Yes.

Q. Pages 14 to 16?

A. Yes. I see no similarity, except that the two of us were curious about something there, and I think there have been others, as I remember, who were also curious.

Q. Doesn't that in part derive from the O'Beirne papers?

A. Well, if I would concede that there has been no previous knowledge that Mrs. Lincoln hired Parker, because Parker himself has been a figure open to question—

Q. Isn't it a fact that the prime source with respect to

the hiring of Parker is the letter from Mrs. Lincoln to
369 Major O'Beirne, including the so-called O'Beirne papers?

A. Yes, to the best of my knowledge, I understand, it is.

Q. And isn't it a fact that the first publication of portions of those papers was in Dr. Eisenschiml's book "Why Was Lincoln Murdered"?

Mr. Martineau: Which papers? Do you mean the letter or the O'Beirne papers?

Mr. Gertz: The O'Beirne papers, of which that Mary Lincoln letter was a part.

A. That I couldn't answer. I have no way of knowing that.

Q. Isn't it a fact that the O'Beirne papers were owned by Dr. Eisenschiml?

A. That I understand from a footnote here.

Q. And discovered by him?

A. Well, that I don't know. "Now in possession of the author" I believe, is the way you stated it. I know nothing of the history of it at all.

Q. Isn't it a fact that you never looked at any of the O'Beirne papers?

A. That's quite correct, yes.

Q. You never looked at Mary Lincoln's letter in question?

A. No.

Q. And nothing in the O'Beirne papers was looked
370 at by you?

A. That is correct. In fact, I stated last evening, I believe, that that was one of the things that I certainly would admit, that anything relating to those were—

A. All right.

Mr. Martineau: Didn't you say last evening you looked at Sandburg on that?

The Witness: Sandburg covers the credits.

Mr. Gertz: To Eisenschiml.

The Witness: And our good friend Mr. O'Beirne covers it without credits probably.

Mr. Gertz: Off the record.

(Discussion off the record.)

By Mr. Gertz:

Q. Turn now to the manuscript, page 42. I refer specifically to the passage "Someone saw to it that Hanscom was never openly questioned, never called as a witness, never quoted * * * and someone guarded Hanscom from * * * censure or punishment for concealing vital evidence." Where did you get that?

Mr. Martineau: That is a negative statement, isn't it?

Mr. Gertz: Yes, whatever it is.

371 Q. Where did you get that language and that idea?

Mr. Martineau: That should be divided into two parts.

Q. Where did you get that language?

A. Right out of my fingers, my head.

Q. Where did you get that thought or idea?

Mr. Martineau: That is a better way to put it.

A. Yes. Well, the thought was undoubtedly inspired by Dr. Eisenschiml. It is again one of those points where once your attention is called to certain parts of a situation, if you are curious at all, I would say you would naturally go on without any further guidance to reach either a conclusion, which may be either a question or a solution.

Mr. Martineau: In other words, you admit you got the idea, that the idea was inspired by Dr. Eisenschiml, but the language, you say, was your own?

The Witness: Yes. The idea was inspired to this extent: that Dr. Eisenschiml drew my attention to Hanscom. I then formed it myself.

By Mr. Gertz:

Q. Now, turn to the manuscript, page 57.

A. All right.

372 Q. Have you got that?

A. Yes.

Q. I am referring specifically to this passage: "It has also been suggested that Booth was playing a crazy game of hare and hounds with the Government * * * here were weapons to indicate assassination, the belongings to implicate the plotters, a map to show the direction of their flight and the spur and gauntlets to hit at escape on horse back."

Where did you get that language?

A. The language is mine.

Q. Where did you get the idea?

A. The idea, I think, is an inspiration from Dr. Eisenschiml.

Q. Turn to Plaintiff's Exhibit 1, pages 167 and 169, and look at those. If by any chance I quote incorrectly, will you correct it, because I am relying on Dr. Eisenschiml's notes, and we may have made mistakes.

A. All right.

Q. Does that refresh your recollection as to where you got the language and the idea?

A. Not the language, no.

Q. Isn't it a fact that you—

A. I will fight you on language.

Q. Read that again.

373 Mr. Martineau: Read it out loud.

Q. Read it out loud.

A. (Reading.) "If the assassins had done no more than put the pursuers on their track by leaving behind a map and a spur and divulged their identities through items marked with their names, it would be possible to assume

that the fox was just indulging in a little fun with the hounds."

Q. Don't you think that is similar language?

Mr. Martineau: No. He said the hare and hounds. The fox and hare are two different things.

Mr. Gertz: I am not going to argue the case.

By Mr. Gertz:

Q. You do not believe you were paralleling or attempting to parallel that language?

A. No, but—

Q. Let us not argue; you say no. You understand we do not argue the case now?

A. Yes.

Q. Did you read the other language?

A. Yes.

Q. All right. Turn to—

Mr. Martineau: The other language you mean which follows that part he did read, like "It would be in
374 harmony with Booth's disdain," and all that?

Mr. Gertz: I am referring to page 167.

Mr. Martineau: Read that language now.

The Witness: Yes. That is merely the list. There is no language involved there.

By Mr. Gertz:

Q. In other words, you have now read the passages indicated on pages 167 and 169 of Plaintiff's Exhibit 1, and you still say that you have not copied or paralleled the language of Dr. Eisenschiml?

A. That's right, yes.

* * * * *

375 Q. Mr. Millard, on all of these questions that I have heretofore given you, and which I have now given you, when I used the word "copy" I do not mean necessarily the exact words. I mean similar words, parallel language,

language stemming from the passage, anything which would indicate that the one passage was the parent, so to speak, of the subsequent passage.

Mr. Martineau: Do you understand that? You
376 can be the child and still not be an infringer.

Mr. Gertz: We will argue that.

Mr. Martineau: I do not want you to confuse this witness.

By Mr. Gertz:

Q. Do you understand what I am driving at?

A. I think I do, yes.

Mr. Gertz: Off the record.

(Discussion off the record.)

By Mr. Gertz:

Q. Turn to the manuscript at Page 58. I refer specifically to this passage: "Otto Eisenschiml, probably the world's leading authority on the mystery of Lincoln's assassination"—

Mr. Martineau: "Mysteries".

Q. (Resuming.) "Mysteries of Lincoln's assassination, has in one curt sentence treated Stanton's diary to the respect to which it deserves * * * it would be exceedingly interesting to know the name of the bellhanger who was so busy with other orders that he had the audacity to incur the ire of the all-powerful Secretary of War by postponing the repair of what was then the most important door bell in Washington."

377 Where did you get that language?

A. That is a direct copy from Dr. Eisenschiml, of course, since I am quoting from him.

Q. It is not only the idea, but the language?

A. That's right.

(A recess was taken.)

378 Friday, March 26, 1954—1. P.M.

Cross-Examination (Continued) by Mr. Gertz.

Q. Referring again to the quotation I read from Page 58 which you said was a direct quotation from Dr. Eisenschiml's book, did you ever ask his permission to use that passage?

A. No, I did not.

Q. Was it your understanding that you did not have to ask his permission?

A. I think my understanding on it was that I wouldn't have to, it would have been certainly the courteous thing to do, but as a matter of necessity, I hadn't thought it was necessary.

Q. Did you ask Otto Eisenschiml's permission to use anything from his books?

A. No.

Q. Was it your understanding that you could use anything from his books without express permission?

A. I can't answer that yes or no. There are so many things involved in my answer. You don't want anything but yes or no?

Q. No, I want you to answer truthfully and thoroughly.

379 Don't answer anything yes or no if you believe your answer has to be qualified. You give your full answer.

A. My answer does. I am back to the same puzzling problem—puzzling to me, over the position of one person in relation to a fact of history. A thing occurred. A train left at a certain time. A newspaper came out on a certain day. Something like that, which is an established fact. I have felt that a person who makes use of that in a literary work of any kind, use of that fact is not by any means given possession of it as a personal thing. Now in the case of the O'Beirne papers I see that differently. There

you have papers that are not public knowledge and public property and in the personal possession of the man—I would consider those quite differently.

Q. Is it your understanding, then, that if Dr. Eisenschiml or for that matter anyone else, used some factual material, that you have the right to use the same factual material?

A. Yes.

Q. Without going to the original sources?

A. Qualifying that, I would say it depends upon the type of material. I wouldn't make that too general a statement, but under the term you are referring to here, I think I would say yes.

380 Q. Is it your understanding that you have the right to paraphrase the Eisenschiml use of the material?

A. No, I would say that the author owned his method of presenting it, that is, the words he uses or whatever is personally his own, but the material, the historical facts, an occurrence beyond this person's control is not his personal property. It is a puzzling thing to me.

Mr. Martineau: Did you mean his method of expression?

The Witness: Yes, his method of expression is his, but as I understand it or feel it, the facts remain public property.

Mr. Martineau: You are not a lawyer, are you?

The Witness: No.

By Mr. Gertz:

Q. I think it would be helpful to us if we take the specific quotation from Dr. Eisenschiml that is in quotes. You have the language in mind?

A. Yes.

Q. Did you understand that to be a statement of fact?

A. I don't believe I understand what you mean by that.

Q. Now you read the particular language, "It
381 would be exceedingly interesting." Do you understand that to be a statement of fact?

A. I am still hazy on your meaning there. What do you mean by a statement of fact? What fact?

Mr. Martineau: You mean a statement of historical fact?

Q. A statement of historical fact. Do you regard that particular quotation as a matter as simply a statement of historical fact?

A. No.

Q. What would you—

A. That is the very reason that I put it in quotes, quoted it exactly and credited it to Dr. Eisenschiml, because in this case I did not feel that way. I would have handled it differently had it been merely a statement of a fact that had occurred.

Q. Now is it not a fact, Mr. Millard, that you used other inferences and surmises or conclusions of Dr. Eisenschiml in the course of your article?

A. In some cases, yes.

Q. Without directly or indirectly quoting him or crediting him?

A. Yes.

382 Mr. Martineau: You mean as distinguished from use of any form of expression of Dr. Eisenschiml, is that what you meant by your question?

Mr. Gertz: Well, it could be either. It could be using the language.

The Witness: If you put "language" in I will withdraw my answer right quick.

Q. In other words, your understanding is that you sometimes used the gist or he basic idea of Dr. Eisenschiml but you deny that you used his language or an approximation of it?

A. I deny that very strongly, yes.

Q. But you don't deny that you used basic ideas and surmises and conclusions of Dr. Eisenschiml in some instances?

A. In some instances.

Q. In your article?

A. I would put it in my words, that I allowed Dr. Eisenschiml's curiosity to awaken mine along the same line.

Q. And you reached the same conclusion and the same guess or the same surmise?

A. In a great many cases, yes, where it occurred. In others, I reached a different conclusion.

383 Q. Would you state what different conclusions from Dr. Eisenschiml you reached in your article?

Mr. Martineau: Now, please.

Mr. Gertz: I would like to know that.

Q. You pick out from your article.

A. I can't now. I wish I knew. It is in the part that was cut out. I remember that. There were two spots in there where while I was putting it down I thought, "I will bet you a nickel I will get a letter from that guy on this. I'll bet he wants to argue on it. We will have some fun."

Q. Will you state the two particular—

A. I can't remember where it was; I will eventually recapture it here but not easily.

Mr. Martineau: How long will it take you to do it? If you want to do it, do it right now. Read the two books if you are going to answer the question, read Eisenschiml's two books and read your article and answer the question.

I'd say it calls for a conclusion and is too general, but if he wants an answer, do it.

By Mr. Gertz:

Q. As I understand it, you will recall now from memory two passages in the unpublished portion of the
384 manuscript where you believe you differed in your conclusions from Dr. Eisenschiml?

A. Yes.

Mr. Martineau: Why don't you ask him with regard to a certain conclusion?

Q. Let's get this straight. In the published portion of your manuscript; in other words, in the article as published you did not, however, differ from Dr. Eisenschiml—

A. Those parts were deleted.

Q. I want to get the facts straight. In the article as published, you don't take any exception to any of the conclusions or surmises of Dr. Eisenschiml, do you?

Mr. Martineau: There is the article.

The Witness: I don't think I do, but I won't make an arbitrary "no" on that. I don't think I do.

* * * * *

385 Q. Mr. Millard, you will notice on Page 58 you refer to Dr. Eisenschiml as "Probably the world's leading authority in the mysteries of Lincoln's assassination" and in the article, "The Devil's Errand Boy" of July 1947 you refer to Dr. Eisenschiml as "An outstanding authority on Lincoln's death."

A. I will apologize for neither of them.

386 Q. Here is what I want to ask you: do you recognize any difference in your description of Dr. Eisenschiml in the two articles?

A. I know to what you refer.

Q. The earlier one you refer to him as the "outstanding authority" and the later one as "probably."

Mr. Martineau: Probably what?

Q. "The world's leading authority."

Mr. Martineau: There is a difference there? You could be the outstanding authority and still be probably the world's leading authority. Isn't this pretty trivial?

Mr. Gertz: I want to get at something.

The Witness: I know your question and there was no

change. There was no reason for a difference there, in my mind.

Q. In other words, you hadn't changed your mind since 1947?

A. I had no reservations at all on it. My choice of language was probably unfortunate at that point.

Mr. Martineau: I will stipulate on behalf of the defendant that Dr. Eisenschiml is the outstanding, leading authority in the world on the assassination of Abraham Lincoln.

387 Mr. Gertz: Will you stipulate also that his views on the subject of Dr. Eisenschiml were the same when he wrote his article as when he published his July 1947 article?

Mr. Martineau: You mean when he wrote "The Devil's Errand Boy"?

Mr. Gertz: No, when he wrote the article of February 1953 his views of Eisenschiml were just the same as his views of him in July 1947.

Mr. Martineau: Exactly. Is that right? That's what I understand his testimony is and we will certainly so stipulate.

Mr. Gertz: In other words, we can have the record show that that's an admitted fact, that as of the February 1953 article Mr. Millard's views of Dr. Eisenschiml were the same as his views of him as of the publication of July 1947?

Mr. Martineau: Precisely, and that's Mr. Millard's testimony.

The Witness: I would even add adjectives to it in 1953 that I hadn't thought of in 1947.

Mr. Martineau: You mean adjectives of praise?

The Witness: Yes.

388 Mr. Gertz: That's an important issue and I want to get it straight without further examination on that point.

By Mr. Gertz:

Q. Now, looking again at Page 58 of the manuscript, the passage reading:

"It is interesting that the man who carried the news to Stanton that night could not recollect having noticed any sinister stranger stalking the door. In fact, all they could remember was that they had gone to Stanton's home, rang his bell and had been admitted at once. A remarkable man this Major Thomas T. Eckert."

A. Where is that?

Q. There are some skip marks just before that, just after the word "at once."

A. There is nothing in this particular section dealing with Eckert, so that seems to have come from another portion entirely.

Q. I will stop with that "at once." Does that refresh your recollection as to where you got that language?

A. The language, always, right from me.

Q. What about the idea? Where did you get that?

A. The idea, I believe, came from Dr. Eisenschiml 389 as part of that same little cluster of incidents revolving around the particular place there. I think I have seen it published elsewhere but I am quite sure that it was all included in what I was using of Dr. Eisenschiml's stuff at that time.

Q. Where else do you think you saw it?

A. It seems to me in connection with that later investigation, that that might have come out.

Q. Which later investigation?

A. In Washington about two years later when there was an investigation. I think prior to the impeachment that I might have seen it in that, but I can't be sure.

Mr. Martineau: You mean the reward thing?

The Witness: No, the Johnson impeachment, I think it was, which was the ultimate culmination of this particular investigation.

By Mr. Gertz:

Q. You just have a recollection and you might be wrong on that point?

A. I could be wrong.

Q. If you were told that it had nothing to do with the investigation preceding the Johnson impeachment trial, would that refresh your recollection?

A. No, I take your word for it. It is that vague.

390 Q. You understand that even though we are sitting about informally you are under oath and you have to testify to the truth in the same manner as if you were in Court before a judge?

Mr. Martineau: And you also understand that the cross examiner is not under oath.

The Witness: Yes. I also understand that he is not on my side, in spite of a grin once in a while.

Q. Turning to Page 77 of the manuscript, specifically the passage reading:

"A remarkable man this Major Thomas T. Eckert • • • he was too busy to give Lincoln the protection for which the President pleaded but he was not too busy to dash around madly • • •", where did you get that quote?

A. That's mine.

Q. Where did you get the idea, the substance?

Mr. Martineau: You mean the idea that he was a remarkable man?

Mr. Gertz: The idea of the quoted passage.

The Witness: The idea, I think I can positively say, was Dr. Eisenschiml. The idea of looking at the facts from that viewpoint.

391 Q. On the same page, I think, of the manuscript, 77, I call your attention to this passage:

"Only someone within the telegraph force could have gotten near enough to the main batteries to short-circuit them."

Mr. Martineau: You left out "the all important main batteries."

Mr. Gertz: I will have to scold my client. You omitted some essential language. Correct it.

Q. Will you read that passage?

A. I will give you the new quote:

"Only someone within the telegraph force could have gotten near enough to the all important main batteries to short-circuit them." There have been a number of cases where your reading has not agreed here, but I haven't—

Q. Wherever I make a mistake, you point out the mistake, but don't worry too much about some of it because that document is an exhibit. Now go ahead.

A. "Eckert's fever for detective work could have been * * * profitably employed there."

Mr. Martineau: "Profitably employed * * * there."

Mr. Gertz: My notes are faulty.

392 Q. Where did you get that language?

A. From myself.

Q. Where did you get the substance of it?

Mr. Martineau: By "substance" you mean—

Mr. Gertz: The idea of it. The thought behind it.

The Witness: You have two statements. To which one are you applying the question?

Q. First of all, the first one.

A. "Only someone within the telegraph force?"

Q. Yes, that one.

A. I rather think that is almost an obvious conclusion. I don't think I would have reached to anyone for that. I have read some testimony on that thing which makes it even more obvious. I can't recall where I have read it but I have read a question and answer—

Q. Didn't you get it from Dr. Eisenschiml's book "Why Was Lincoln Murdered?" Plaintiff's Exhibit 1? Turn to Page 82 of Plaintiff's Exhibit 1.

Mr. Martineau: Whereabouts?

Mr. Gertz: About the middle of the page, "There is hardly room for doubt" and so forth.

393 Mr. Martineau: Would you read the parts you are suggesting to him?

Mr. Gertz: The paragraph that begins, "There is hardly room for doubt" all the way to the end of that paragraph.

The Witness: No, this rings no bell with me at all. I am quite sure that my own reaching for information on it went somewhere else because I have a vague recollection of reading testimony in regard to that and there may even have been a statement or a suggestion in there that it had to be done within the telegraph office. That was something that could only be done—

By Mr. Gertz:

Q. Is it not a fact, Mr. Millard, that all papers and books with respect to the assassination other than Dr. Eisenschiml's state that the wires were cut?

A. I don't know about that. I know many do. I couldn't say that all do.

Q. Is it not a fact that Dr. Eisenschiml was the only one who pointed out that the wires were grounded?

A. No, I won't accept that as a fact.

Q. Will you state any other source which says that the wires were grounded and not cut?

394 A. If I could remember that—

Q. You take your time and give me the source other than Dr. Eisenschiml.

A. It is a transcript of questions and answers and the man under questioning was, I am positive, the head of the Commercial Telegraph Lines and it was he who said that he thought rather than being cut, the interruption had been performed by throwing wires across the main batter-

ies and that the main batteries were in, I believe, a back room of the telegraph office and therefore were only accessible to somebody in the telegraph office there and, as I remember, the thing never went any further. It was dropped with that.

Q. Isn't that what Dr. Eisenschiml says in his writings?

A. If this is the only place he has written on it, no. If he elaborates further in some other part of one of the books, it is possible, but I have this very sharp recollection of quite a lot of data on it in question and answer form.

Q. But you don't know where?

A. No.

Mr. Martineau: Can you find out?

The Witness: Well, I can reach, but—

Q. Well, if you should, during the course of this
395 examination think where, you, at that point, volunteer it, won't you?

A. I will, yes. May I ask your client a question just to save myself some short cuts at this point?

Mr. Gertz: Do you have any objection, Jack?

Mr. Martineau: None at all.

Mr. Gertz: Do you want it off or on the record?

The Witness: Doctor, you can save me some trouble. That testimony would not have been in the Pitman transcript, would it?

Dr. Eisenschiml: No, that's positive.

The Witness: That's what I thought, but rather than start mulling through there, I thought I could get it. OK, thank you.

By Mr. Gertz:

Q. Do you want to think more on that question or do you want to let it rest in your mind?

A. May I think about it as you go along?

Mr. Martineau: You better think about what he is asking you as you go along.

Mr. Gertz: His subconscious will probably think of it.

396 By Mr. Gertz:

Q. Turning to page 78 of the manuscript, the passage I refer to: "Instead * * * spent days studying the register of the National Hotel."

A. We have a wrong page here somewhere.

* * * * *

Q. Let's read the whole passage there. Will you read aloud?

A. Yes.

"Instead, the busy Major spent days studying the register of the National Hotel to discover just how often John Wilkes Booth had stayed there. He spent more
397 days on the Monitor where Louis Payne was held prisoner and finally came up triumphantly with a full 'confession' of the whole conspiracy."

Q. Where did you get that language?

A. From me.

Q. Where did you get the substance of that?

Mr. Martineau: You mean the idea?

Q. The idea and the substance of it, the actual material?

Mr. Martineau: Wait a minute. Let's have a distinction here between form and substance.

Q. I will break it down. Where did you get the material to what that refers?

A. I am positive it came from the same source as the material in the previous question regarding Major Eckert and the telegraph service. I still link that in my mind with an investigation.

Q. Could it have been Dr. Eisenschiml's books?

A. I don't think so.

Q. In other words, you don't really recall?

A. No. Can you tell me the page?

Q. Will you look at page 81 of Plaintiff's Exhibit 1. Does that page refresh your recollection?

398 A. I have it here. It refreshes me in a way that you are not intending there, I believe. Now I am convinced that where I got much of this was from the investigation, the committee business that you mention here. That may have been where I ran on this questions and answers discussion of this whole subject.

Mr. Martineau: You say you mention. Do you mean Dr. Eisenschiml?

The Witness: Yes, "Judiciary Committee of the House in 1867."

Mr. Martineau: Have you finished your answer?

The Witness: Yes.

Q. You have just a vague recollection on that?

A. Yes, but it is clear on certain physical things. I could see the form of the material I was reading at the time.

Q. Turn to page 80 of the manuscript, the passage "Whatever excuse the War Department had for overlooking the Port Tobacco Road, it could not have been ignorance. Even the newspapers had published the details of this route of spies, couriers and so forth. Lafayette Baker had followed it as a matter of course on a spying trip to Richmond."

Q. Where did you get that language?

A. From myself.

399 Q. Where did you get the material?

A. The material from the newspaper and from Lafayette Baker. I can tell you that. I know that's "History of the Secret Service" that that came from.

Q. Did you get it from Dr. Eisenschiml?

A. No.

Q. Will you turn to page 98 of Plaintiff's Exhibit 1 and look at that. Does that refresh your recollection?

A. That doesn't change it. It refreshes it, yes.

Mr. Martineau: Refreshes as to what?

Mr. Gertz: As to where he got the material or the language.

Mr. Martineau: He is asking you if you got it from Dr. Eisenschiml.

The Witness: I did not get it from Dr. Eisenschiml.

Q. Even after looking at page 98 do you answer that way?

A. Yes.

Mr. Martineau: Not "even". You mean after he looks at that he answers that way. Let's not have any argument here.

Q. Page 80 of the manuscript, this passage:

400 "Logic alone should have focused attention to this road. It was the only one not leading into Union territory. The only garrison close to it"—

Q. No, shall I read it from here?

Q. Yes.

A. "It was the only one not leading into loyal Union territory; the only one without a Federal garrison close to it. The only Federal troops were a small body down at Chapel Point and they had no telegraph to alert them in time to be effective. The rest of the peninsula was largely wilderness teeming with guerrilla and rabid Lincoln haters."

Q. Where did you get that language?

A. From myself.

Q. Where did you get the material?

Mr. Martineau: You mean—

Mr. Gertz: The material itself.

Mr. Martineau: The idea?

Mr. Gertz: Yes, the idea and the material.

Mr. Martineau: Wait a minute. I want to be clear when you say "material."

Mr. Gertz: Where did you get the idea?

The Witness: It is almost an unanswerable question.

401 By Mr. Gertz:

Q. Where did you get the material?

A. The material from—

Mr. Martineau: Do you understand what he means by material now? We have language, idea, material; three things.

The Witness: There are times when I will accept the two as being the same but in this case they are separate and I don't want them conflicting. I will let it get by some places where they are practically identical.

Mr. Martineau: I just want to make sure that we all understand each other.

Q. Have you answered that question?

A. No, I haven't. I am trying to think. I can't remember my source on it now.

Q. Was it Dr. Eisenschiml's books?

A. I don't think so.

Q. Where is Chapel Point?

A. It is on the lower penninsula of Maryland there somewhere.

Q. Near where?

A. Not too far from Port Tobacco, as I remember.

Q. You have a volume of maps. Will you find it 402 on the maps?

A. Somewhere, and I don't think I have it with me, I have a map showing the old fortifications and military establishments around Washington at that time.

Q. Will the record show the book you are looking at?

A. Yes, this is Mitchell's New General Atlas which is dated 1865.

Mr. Gertz: Which is one of the books produced by the witness?

Mr. Martineau: Yesterday, that's right, and identified by him yesterday. Correct.

The Witness: I don't see it.

By Mr. Gertz:

Q. Are you sure?

A. No, a lot of names to look at yet.

Q. Is it not a fact that it is not on any map?

A. I don't know.

Q. In other words, you don't know if that's a fact?

A. No, I don't.

Q. Except, of course, the map in Dr. Eisenschiml's book?

A. That, I wouldn't know. You can tell me that and I will probably accept it as a fact.

403 Mr. Martineau: Is it your position that there is no such place as Chapel Point?

Mr. Gertz: No known map other than Dr. Eisenschiml's map—

Mr. Martineau: Aside from the position on the map, do you take the position that there was no such place in the world as Chapel Point?

Mr. Gertz: I am not taking that position.

By Mr. Gertz: Q. In other words, you don't know whether or not it appears in any map other than Dr. Eisenschiml's map?

A. No, I don't know.

Mr. Martineau: You mean on the search you have made so far?

The Witness: Yes.

Q. All right now, is Chapel Point known by any other name?

A. I don't know.

Q. Is it not a fact that it was known by another name?

A. I don't know.

* * * * *

404 Q. Is it not a fact that that particular spot is known by a name other than the one I gave and the one you gave from Baker?

Mr. Martineau: That question has been asked already.

A. Yes, and I say I don't know. I knew it only under these circumstances and by that name. Baker refers to it several places here which I could find.

405 Q. Will you turn to Page 98 and also 102 of Plaintiff's Exhibit 1?

Mr. Martineau: 98 of Plaintiff's Exhibit 1?

Mr. Gertz: Yes, 98 and then 102.

Mr. Martineau: Whereabouts on the page? What part do you want him to look at?

The Witness: Chapel Point is not mentioned there. What other page did you have?

Q. Do those two pages refresh your recollection as to where you got the language?

Mr. Martineau: Now I am confused.

A. I need no refreshing on the language. I know where I got that.

Q. You got it from yourself?

A. Yes.

Mr. Martineau: Where did you get the language?

The Witness: Right out of me.

Q. Do those two passages or pages refresh your recollection as to where you got the ideas or where you got the material?

A. The material, I think I got from several sources, including Baker.

Q. Did you get it from Dr. Eisenschiml?

406 A. Well, undoubtedly he contributed to the thing. It would hardly be otherwise because he had covered

it. As I remember, I also used or in the course of going through it referred to other sources on it, too.

Q. How did you learn that Chapel Point had no telegraph?

A. Well, because that was the point where Beckwith was dropped off to establish one by O'Beirne's troop.

Q. Where did you read that?

A. In Baker.

Q. Where in Baker?

A. It is on the record, if I can find the thing again.

Mr. Gertz: Withdraw that question.

Mr. Martineau: What is the question withdrawn?

Mr. Gertz: The question was how did he know that there was no telegraph?

Mr. Martineau: Are you using this word "material" in asking the same as in the sense of the language?

Mr. Gertz: When you refer to "material" you mean the information?

Mr. Martineau: You mean the historical facts?

407 Mr. Gertz: Whatever information there is. Say in a paragraph dealing with a certain subject, the facts.

Mr. Martineau: Just a point I want to get straight. Are we clear that material, the term "material" and the term "idea" are both in sharp contra-distinction to the form of expression?

Mr. Gertz: Material could mean historical fact or information. It could include inferences, conclusions in contra-distinction with language.

Mr. Martineau: That's what I want to make clear.

Mr. Gertz: I would call the material, the substance as contrasted with the language.

Mr. Martineau: With the form of expression. OK, good.

Mr. Gertz: Of course, I don't regard the distinction as important.

Mr. Martineau: There is no question pending right now, you withdrew the other question?

Mr. Gertz: Yes.

By Mr. Gertz: Q. Will you turn to page 88 of the 408 manuscript, the passage beginning:

"Dr. Mudd studied the picture • • • and shook his head. That, he was positive, was not the man he had treated • • • the picture that was not John W. Booth at all but of his brother Edwin whom he did not even resemble."

Q. Where did you get that language?

A. The language is mine.

Q. Where did you get the material?

A. I got the existence of the wrong—I mean the use of the wrong picture which is Dr. Eisenschiml's discovery. The other I think came from reading over transcripts or something in the investigation there when I was in Washington.

Q. Will you look at Page 263 and then 264 of Plaintiff's Exhibit 1? Have you looked at both of those passages?

A. I realize where I got the material and the idea was from Dr. Eisenschiml.

Q. Isn't it a fact that you also got the language from him?

A. No.

Q. Let me read you a particular passage from Page 263 of Plaintiff's Exhibit 1:

"But Dr. Mudd did not recognize it as a picture of the man he had treated." Did you use that language?

409 A. No. I said, "That, he was positive, was not the man he had treated."

Q. You used, at any rate, the phrase, "The man he had treated?"

Mr. Martineau: Dr. Mudd at this time studied the picture.

The Witness: "Ernestly and shook his head. That, he was positive, was not the man he had treated."

Q. Didn't you use the following language, substantially, from Page 264 of Plaintiff's Exhibit 1, on top:

"The answer to this query is amazing. The photograph of Booth used throughout the whole trial was not a picture of John Wilkes Booth at all but one of his brother Edwin."

A. Well, there is a similarity. That, I don't think—that use of the term "at all" is a colloquialism that I am guilty of in a great many cases.

Mr. Martineau: Read what you say here on Page 89 of your manuscript.

The Witness: My quotation is:

"A picture that was not of John Wilkes Booth at all, but of his brother, Edwin, whom he did not even
410 resemble!"

Q. Isn't that the language used by Dr. Eisenschiml?

Mr. Martineau: I object to that. Whatever the language is is there.

The Witness: There are two words of the same here, his use of the expression "at all" and mine are the only similarity I see. After all, you are dealing with a very brief and very simple fact. There are only a limited number of ways to say it.

Mr. Martineau: The Declaration of Independence was signed on July 4, 1776. How else are you going to say that?

Mr. Gertz: Well, if that were in issue it would be another story, but here we have something more on that. I am not going to argue the case. I am just asking him the question.

By Mr. Gertz: Q. Turn to Page 92 of the manuscript, the passage beginning:

"Two circumstances of Surratt's flight • • • one was that the telegrams"—

A. You better let me read it. "Two circumstances of Surratt's flight contributes to the mysteries of the
411 moment. One was the fact that the telegrams to the Canadian border warning of his flight were accompanied by descriptions of Atzerodt. No two men could have looked less alike." Is that as far as you want to go?

Q. Yes, that's all right. Is your recollection refreshed as to where you got that language?

A. That language is mine.

Mr. Martineau: It doesn't appear that his recollection is exhausted yet on that.

The Witness: No.

Q. Where did you get that language?

A. Right from myself.

Q. Where did you get the material?

A. Probably from Dr. Eisenschiml.

Q. And the idea from him too?

A. Well, what do you mean by the idea? There is no idea involved. There is a statement of what was in the telegram. If you call that an idea, yes, he stated what was in the telegram.

Q. Now, on the same page of the manuscript, 92, the passage beginning:

"The second circumstance was a queer accident."

Will you read that so we are sure it is right?

412 Mr. Martineau: Let him read it.

Q. "The second circumstance was a queer accident. As the train to Montreal waited at the station in St. Albans, Vermont, a bartender saw Surratt among the passengers and thought he answered the description of John Wilkes Booth. The bartender rushed out for help and

could not locate a single policeman, detective, soldier or border guard until after the train had pulled across the border. Yet, just before and just after this moment St. Albans had teemed with man hunters." Where did you get that?

A. From myself.

Q. Where did you get the material?

A. I would say offhand from the transcript of the trial.

Q. Which transcript?

A. Pitman's.

Q. Did you get it from Dr. Eisenschiml?

A. I don't think so.

Q. Did you get the material in any way from Dr. Eisenschiml?

Mr. Martineau: He said he didn't.

Q. Let's turn to Pages 196 and 197 of Plaintiff's Exhibit 1, the entire second half of Page 196 after the three asterisks and then Page 197, the second paragraph. 413 Does reading those passages refresh your recollection as to where you got the language?

A. It needed no refreshing. It is my language.

Mr. Martineau: You mean the language in your manuscript that you read first?

The Witness: Yes.

Q. Including the use of the word "queer?"

A. I said, "A queer accident." This is "The queerest of coincidences."

Mr. Martineau: I think the reporter is confused. You said "A queer accident" and in Dr. Eisenschiml's book he says "One of the queerest of coincidences."

The Witness: Yes.

Mr. Martineau: There is no claim that there is a property right to the use of the word "queer" is there, I trust?

Mr. Gertz: You know, in order to prove copying you use words and phrases and thoughts and passages in general.

Mr. Martineau: You use the whole book, tout ensemble, you use. Let's go on.

By Mr. Gertz:

414 Q. Look at Page 197.

A. This is language now you are on?

Q. Yes, I am talking about language.

Mr. Martineau: In other words, the question now is did he get the language he used on Page 92 of his manuscript from Pages 196 and 197 of Dr. Eisenschiml's book?

The Witness: I don't even see anything about the words "train" and "border." So, I don't quite get the point. I see no similarity at all between mine and Dr. Eisenschiml's language.

Q. Turn to Page 98 of your manuscript. I suppose you want me to read the passages—

Mr. Martineau: You read a few and then let him read a few. Let's share this thing. Or I will read them or somebody.

Q. I refer to the passage reading:

"Two years later Luther Baker made a significant slip of the tongue under questioning. Asked to describe his expedition to Virginia he wanted to know which one, blurting 'I went on three distinct trips.' Unfortunately, his questioners were too single minded to probe the other two which hint at a whole sphere of under cover activity
415 that never reached the records." Where did you get that language?

A. From myself.

Q. Where did you get the material?

A. I am vague, but I would guess Eisenschiml.

Mr. Martineau: What page? What was going to be your next question?

Mr. Gertz: He is right in the answer but I don't have the exact page. He would have put me to the trouble of locating it.

(Discussion off the record.)

Q. Turn to Page 100 of the manuscript. I am referring to the passage reading:

"Years later Major O'Beirne made the startling statement that there had been three men in the barn that night, and that Booth had slipped out between the guards, leaving the mysterious third man with Harold. O'Beirne was not an eye-witness and unfortunately he never revealed the source of his information." Where did you get that language?

A. From myself.

Q. Where did you get that material?

A. I don't remember on that right at the moment, you wait a bit and maybe it will come to me.

Q. Was it from Dr. Eisenschiml?

416 A. I don't know, I say.

Q. Will you look at Page 69 of Plaintiff's Exhibit 2?

A. I have a hunch now that you have tipped me off here, of course you give me the ammunition here but I do think that that must have been from, Izola Forrester because, as I said, I used her book and used her other books on Booth.

Q. Isn't it a fact you got the language from Dr. Eisenschiml?

A. No.

Q. Isn't it a fact that you got the material from Dr. Eisenschiml?

A. That, I don't think so.

Q. But you are not sure?

A. I am not sure.

Q. Let's turn to Page 132 of your manuscript. I am referring, I would say, to the entire page.

A. I think you would probably include part of this since there is a continuation of that, I believe. When you get to a certain point I have a statement to read in which will have some color on everything that has been said so far.

Q. I am referring particularly to this language:

"Stanton cried indignant denials. The diary was in exactly the condition it had been when he got it
417 and he had witnesses to verify that. If it had been mutilated as it obviously had, the job was done before it was handed to him. This was obviously weak. Nobody could quite conceive of the all mighty Stanton complacently accepting the mutilated diary without demanding to know where the missing pages had gone and Banker had his witnesses to swear it had been whole."

Where did you get that language?

A. From myself.

Q. Where did you get the material?

A. The material from the archives or the Congressional Globe, I believe.

Q. Where there?

A. It was in relation to the committee on claims I think. The committee of parceling out the awards which happened to be a matter I went through and researched very thoroughly a great many years ago. I did that in 1946 when I was on the original Baker and transferred some of that research and reused it, rather, on this, but I do remember that I took voluminous notes and spent days at the Congressional Globe getting all the testimony that was given on this thing.

I will say at this point it is my recollection quite clearly, a matter I haven't brought up before, that at the time I met Dr. Eisenschiml when I was researching on
418 Baker at that time, that he very generously offered, in some words I don't recall, the use of any material he had on Baker, that I was welcome to use anything that he had on Baker or words to that effect. Now, I don't use that as an excuse or an apology but I bring that up.

Q. Did you get any of that material from Dr. Eisenschiml's books?

A. No, that, I didn't. That I happen to know because it is clear in my mind.

Q. Did you get any of the language from Dr. Eisenschiml?

A. No, sir.

Q. Or any of the ideas from him?

A. No.

Q. Turn to Pages 142 and 143 of Plaintiff's Exhibit 1. 143 alone.

Mr. Martineau: What is the question?

Q. Does that page refresh your recollection?

A. It doesn't change my recollection. It just shocks me a little.

Q. Did you get the language from Dr. Eisenschiml?

A. Not consciously, no.

Q. Unconsciously now that you now realize—

A. That's something that I could not say.

419 Q. Do you recognize that there is a similarity?

A. I see a similarity here more than I will admit on most of the others. It is not a copy but there is a similarity and a rather shocking one to me.

Q. All right, we will go to the next. Page 132 of the manuscript.

Mr. Martineau: You mean penciled? This is Page 132 because it doesn't go as far as penciled 132.

The Witness: 119 is the last.

Q. All right, 132 of the manuscript. That's the typewritten 132. Let me have the page and I will read the passage. 132 and also 133. Here is the passage I have reference to:

"This was too much even for the investigating committee. Since the missing pages covered only the dates before the assassination, how could they contain instances of the assassin's flight after the murder? In the end, caught between two such monumental liars as Stanton and

Baker, the committee gave up in disgust and dropped the investigation." Where did you get that language?

A. From myself.

Q. Where did you get the material?

A. I got the material from the same source as the
420 preceding question, that is, from the files of the Congressional Globe and the reports of the investigating committee.

Q. Did you do it through Dr. Eisenschiml?

A. No, though whether or not he inspired the curiosity toward it from this, I couldn't say. It is quite possible. I was very—feeling very bitter against Baker as I wrote this. I was feeling my character very strongly and I used strong language.

Q. Turn to the manuscript, 117 in pencil, 133 in type. I refer to this passage:

"Baker went back to Philadelphia and a year later he suddenly died. He had been in excellent health until the last and the records disagreed as to the cause of his death."

Where did you get that language?

A. From myself.

Q. Where did you get the material?

A. I think the idea was put into my mind by Dr. Eisenschiml. I have a feeling that it is one of the things we discussed that day in your library before I had read your books, when we were first talking about Baker.

Q. Addressing your remarks to Dr. Eisenschiml?

A. Yes. At that time he was telling me things
421 that I hadn't yet discovered were in print and I believe that that is one of them. I think he said, "Did you know that there was something about his death?" I believe, I may be wrong on that. If I am, you can correct me.

Q. Will you turn to Pages 151 and 152 of Plaintiff's

Exhibit 1? Does that passage refresh your recollection as to where you got the language?

A. The language is mine.

Q. But where you got the material?

A. The material I think came from Dr. Eisenschiml, either directly or through here.

Q. And isn't it a fact—

A. —because he mentioned the death certificate to me and I know that it not a thing that I would have been likely to discover myself except by accident, so I am positive—

Q. Isn't it a fact that Dr. Eisenschiml is the one who pointed out the discrepancy between the death certificate and other reports of his death?

A. Yes, definitely.

Q. Now turn to the manuscript again, Page 117 in pencil, 133 in type, to this passage:

"Shortly before his death he sent for an old friend and confidant, Colonel Wood, a man Stanton had made 422 superintendent of Old Capitol Prison as the reward for lying Stanton into victory in the law case. Wood knew many of Stanton's darkest secrets and had kept them well. Reporting that visit Wood wrote afterward 'In his broken down and depressed condition he declared that he was haunted day and night by visions of the unfortunate woman, Mary Surratt and that he could not live under the pressure he was bearing.' Then Wood made a significant remark: 'I assured him that no publication of facts in the matter would be made during his lifetime and that if I should die first the papers would be destroyed.' This temporarily quieted him." Where did you get that language?

A. From myself.

Q. Where did you get the material?

A. I got the idea from Dr. Eisenschiml and I believe the material I hunted or found in some published work of

Wood's, that latter part. Now, the earlier part, Sandburg and a number of other writers bring out Wood's connection with Stanton in the early days of Lincoln's law practice, so that's rather general knowledge, but as to the deathbed part in there, I was certainly guided to it through Dr. Eisenschiml's mention of it and then, as I recall, located and studied all of Wood's published material.

423 I cannot remember whether that was in an article or a book. I have a feeling it was in a magazine article form, historical.

Mr. Martineau: Just a minute. He said Lincoln's law practice. Did you mean Stanton's law practice?

The Witness: No, I meant Lincoln. Stanton and Lincoln were opponents in the early days and Stanton chiseled the devil out of Lincoln.

By Mr. Gertz:

Q. Isn't it a fact that Stanton and Lincoln were on the same side of a law suit and not on opposite sides?

A. Perhaps that's true. I don't know. My recollection is hazy except as to its involving a model which Wood changed or built the wrong way and camouflaged with vinegar and dirt or something to make it look old and it was a reaping machine of some sort, I believe.

Q. Mr. Millard, will you, in connection with the passage I have just read, look at Page 289 of Plaintiff's Exhibit 1, the last five lines and also at Page 187 of Plaintiff's Exhibit 2?

Mr. Martineau: You mean that part quoting from Wood there? What is the question?

Q. Do those two pages of the Eisenschiml books

424 refresh your recollection as to where you got the language?

A. Yes. It is quite obvious that my recollection was wrong because it apparently came from here. I still had

that feeling that I read something but I am sure I didn't read it in the archives.

Q. Did you ever see the issue of the Washington Gazette referred to in those two passages?

A. Not that I am aware of.

Q. Is it not a fact that the only known copy is the Eisenschiml copy?

A. I don't know. I wouldn't have any way of knowing that.

Q. But at any rate, you never looked at that issue of the Washington Gazette?

A. No, I am quite sure I did not. No, my recollection was that it was another one of these endless reminiscences that were being published in magazines for a time.

Q. But you see now that you were mistaken?

A. Yes, I was mistaken.

Q. And that those derived—

A. Those derived very directly from Dr. Eisenschiml.

Mr. Martineau: You mean the material or the ideas?

Q. And the language?

425 A. Not the language.

Q. At any rate, so there won't be any misunderstanding, you did not look at the source itself, the Washington Gazette?

A. No, that I didn't. The moment I saw Washington Gazette I was sure because that didn't gibe with anything in my memory.

Mr. Martineau: Are all the pages of Exhibit 1 there together now?

The Witness: Yes.

Mr. Martineau: Are you through with Exhibit 1 for a while?

Mr. Gertz: Yes, we are through with Exhibit 1 for a while.

(Discussion off the record.)

By Mr. Gertz:

Q. I am going to ask you about that manuscript again. When you submitted the manuscript, Defendant's Exhibit 2. you submitted it for the purpose of publication?

A. Yes.

Q. And you wanted it to be published in full, did you not?

A. Yes.

Q. In other words, you did not submit it with the
426 thought that the passages which happened to be cut out were going to be cut out?

A. I submitted it with the almost sure knowledge that half of it would be cut out but not which half.

Q. In other words, so far as you were concerned it might have been the passages that were cut out or if you were doing the job, you might have cut out other passages instead?

A. Yes, but only to achieve what I thought was proper balance in the article.

Mr. Martineau: You are dealing with a hypothetical question, you understand. If you had done this, then something else would have followed.

The Witness: Yes.

By Mr. Gertz:

Q. You submitted your manuscript. Did you get back proofs?

A. No.

Q. In other words, you never corrected proofs?

A. No.

Q. Was there ever any correspondence or discussion between you and anyone connected with the defendant with respect to what was going to be cut out or left
427 in the manuscript?

A. No.

Q. Was there any general conversation on the subject?

I don't mean about the specific passages but did anybody connected with the defendant tell you that parts of it were going to be cut out?

A. Yes, I knew that.

Q. Who told you that?

A. Tom Naughton, the editor.

Q. When did he tell you that?

A. I can't tell you that specifically. It all revolves around the fact that I was urging "True" through Tom to publish this in its entirely which would mean a two-part story which was against their principles and finally I said, I believe by telephone, "I am going to gamble. I am so wrapped up in this study and I want to do it so badly, I am going to gamble my time and write a two-parter and hope that I can write it so powerfully that I could overcome their prejudices and get them to run it that way." Yet I knew and Tom assured me then that my chances were one in a thousand of succeeding and I recognized that, but nevertheless I went ahead and wrote it as I thought it should be.

* * * * *

430 Q. When you discovered in reading the published article that the references to Dr. Eisenschiml was deleted, did you ask for or receive any explanation?

Mr. Martineau: Just a minute. Read that question of Mr. Gertz'.

(Question read back.)

Mr. Martineau: You are getting away from the question about the quotes.

Mr. Gertz: I will go back to that.

The Witness: Yes, I did. I raised quite a small storm about it.

Q. Did you write to them on it?

A. No, I was up here at the time.

Q. With whom did you talk?

A. Tom Naughton.

Q. When was that?

A. The editor. Some time during the summer following publication, in the spring following publication which would be, I would say, late June or early July of 1953. No, wait a minute. It may have been on an earlier trip. I rather think it was because it was well before this matter came up.

Q. By "this matter" you mean our suit?

431 A. Your suit, yes. At that time I was only complaining from the standpoint of the honor I wanted included in there which I thought was deserved because of Dr. Eisenschiml's position in the field. As for explanation, there was none, except that the article had to be cut and the editor tried his best to cut it to what he thought was a good finished piece.

Mr. Martineau: Excuse me. Read that part of his answer where he said something about the honor to be accorded Dr. Eisenschiml.

(Read back.)

Mr. Martineau: Would you explain what you mean by that language which you used about the honor?

The Witness: What I am trying to say is that at that time I was not bothered by any thought of being sued or being even condemned except that I felt that I had wanted to pay homage to Dr. Eisenschiml because of his position in it and I was disappointed that I had been deprived of the chance to do it.

Mr. Martineau: You mean because that had been cut out of your original manuscript?

432 The Witness: Yes.

By Mr. Gertz:

Q. Did you have any correspondence with anyone connected with the defendant on that subject?

A. No, I don't believe so.

Q. Where did you get the time-table of the Camden and Amboy Railroad of 1865?

Mr. Martineau: Which quote is that?

Q. Referring to Page 105 of your printed article.

A. Quote 7. That, as I said last night, was from Dr. Eisenschiml's reproduction of it in his book.

Q. And is it not a fact that that time-table is nowhere else in existence?

A. I don't know.

Q. You have never looked at any time-table?

A. No, I doubt very much that your statement is correct because I had a later time-table referring back to earlier ones which undoubtedly covered it.

Q. But at any rate, you never looked at any time-table?

A. No.

Q. Your only thought was the Eisenschiml book?

A. That's right.

Q. And everything that you said with respect to *433 that is based upon what Eisenschiml has in his book, Plaintiff's Exhibit 1?

A. Well, don't take in too much ground on your statement now. Let's clarify that a bit. You will have me admitting everything in the record here on the general statements like that.

Mr. Martineau: Don't push your luck too far, Mr. Gertz.

By Mr. Gertz:

Q. With respect to that time-table, is there anything that you said in your article which was not derived from the Eisenschiml material?

A. Yes. As I think I said last night, the time and the unpleasantness of the train trip was brought out by General Porter in his article on campaigning with Grant that I referred to last evening.

Q. But that was in general terms?

A. That was in more general terms. I then went—I

knew that I had bought this old time-table and I rushed to it to see if I had a copy of the time-table, found that I didn't have one for that year but that this referred to earlier ones so I thought, well, they are certainly available. I will just take this one and save myself messing around looking for it.

434 Q. So, as a matter of fact, you relied completely upon the Eisenschiml—

A. I relied completely for that comparison between the two trains trip.

Mr. Martineau: Your question, as I understand it, relates solely to the question of the time-table here, not the other incidents involved in Quote 7?

Mr. Gertz: Yes.

Q. And that relates to the details of the trip of Grant to his children.

A. Yes.

Mr. Martineau: Just a minute now. He said before that he got some of that from General Porter.

Mr. Gertz: The unpleasantness of the trip he got from General Porter but not the specific details.

Mr. Martineau: The time-table alone, as I understand it, is what he got from Dr. Eisenschiml.

The Witness: Yes.

By Mr. Gertz:

Q. Isn't it a fact that nobody gave the time of the trip other than Dr. Eisenschiml and the connections?

435 Mr. Martineau: Which trip?

Mr. Gertz: The trip of Grant to his children.

The Witness: Porter mentions that he had to make two changes. It is a long time. I am hazy on that. He mentions the two changes. It seems to me he gives the time of leaving. It also seems to me that there are other sources for the time of leaving because they involve what was sup-

posed to have been Booth's following the carriage to the train.

Q. Are there any sources that you know which give the time of arrival?

A. No.

Q. Eisenschiml is the only source for this?

A. Yes.

Q. Did you ever see the Macon Daily News of April 26, 1865?

A. No, that I didn't.

Q. And your sole knowledge of its contents is from Eisenschiml's books?

A. Yes, that's correct.

Mr. Martineau: Which quote is that, Mr. Gertz; do you know?

436 The Witness: It is Quote 28.

By Mr. Gertz:

Q. Did you ever make inquiry to learn why the Macon Daily News did not get the assassination story until April 26, 1865?

A. As I remember, I inquired only to this extent, of going through the war records and looking at whatever telegrams were sent in connection with the news of the assassination.

Q. Did you learn why it did not get the story until April 26th?

A. No.

Mr. Martineau: You mean why that paper didn't?

Mr. Gertz: Yes.

Q. So that to this moment you don't know why?

A. No, only as I remember, there simply was nothing sent, I think, the earlier time.

Q. I didn't get the last part.

A. I said only I believe that I found there was no notice sent any earlier than that. That's the only reason they

didn't get it, as I gathered, is because it was not sent to them.

Mr. Martineau: That's a pretty good reason, 437 isn't it?

Q. Isn't it a fact that the office of the paper had been raided, the paper temporarily suspended publication and that was why it did not publish the news?

A. That, I don't know.

Q. Did you ever see the Richmond Whig of April 15, April 16 and April 17, all of 1865?

A. No, I don't believe I did.

Q. You never saw any of those?

A. No.

Q. And your only source of information as to the contents thereof are the Eisenschiml books?

A. Not the only, no. I referred to the Rebel War Courts diary when he mentions when the news was received by gossip and when it appeared in the paper.

Q. But it doesn't mention what was said?

A. No, nor did I quote anything that was said in there. I merely spoke of the announcement. I said, "Got no notice at all," I think was all I said.

Q. Did you ever see the Middletown Whig Press of April 14, 1865?

A. No.

Q. Is it not a fact that your only knowledge as to 438 the contents of that particular publication was the Eisenschiml book?

A. No, that's not a fact.

Q. Where else did you learn of the contents?

A. I learned of it, I believe, in connection with the investigation I mentioned before that I did in Washington, I believe it was Butler's Committee.

Q. Could you give us the specific reference?

A. No, I can't.

Mr. Martineau: Have you got that in your cards there? Have you got that thing about the Middletown Whig Press or whatever it was?

The Witness: All I have here and all my recollection will tell me is that it was either the archives or the Globe in which I saw it. I am quite sure I would not have looked for it, however, as enthusiastically if I hadn't had Dr. Eisenschiml to stimulate my curiosity, although there was this earlier mention in 1865 in the book, "The Assassination and History of the Conspiracy," that there were other papers, but they were not named, so Dr. Eisenschiml named them and then later as I say, my memory tells me that
439 I saw them in the reports that I read there.

Q. But that's simply a hazy recollection?

A. It is a very hazy one, yes.

Mr. Martineau: You said the Globe. Is that the Congressional Globe that you mentioned?

The Witness: Yes, Congressional Globe.

Q. Where in the Congressional Globe?

A. That, I don't know.

Q. You don't even know whether or not it actually appeared there?

A. I am not positive.

Q. Did you ever look at the Newburgh Journal?

A. No.

Q. Is it not a fact that the only source as to the contents of that publication are the Eisenschiml books?

A. May I simplify it by saying same answer as the previous question, all the way through, arguments included.

Q. In other words, you think you may conceivably have seen it elsewhere but you have no recollection and have no notes and have been able to find nothing on it?

A. No.

Q. Did you ever see the New York Sun of February 11, 1917?

440 A. Yes, I did.

Q. When?

A. Some time during the summer of 1952.

Q. Where?

A. In the lower section of the New York Library. They have a separate section downtown for newspapers and old papers and matter of that kind and I went down there. I had a whole collection of references to newspapers. I went down there and spent a day going over them, I remember.

Q. Your original reference, however, was derived from the Eisenschiml book, is that correct?

A. I fail to remember what the Sun is in regard to. Can you give me the quote?

Q. Would you look at Plaintiff's Exhibit 2, Page 71?

A. I am trying to find the quote in here that you are referring to, so I will know what the subject is.

Q. I think it would take too much time if you looked for the direct quote on each of these.

A. Now I see what the subject is. I am not going to be so positive on my answers. I was thinking of the newspapers in connection with the other. I see what this is now and now I am not going to be quite as positive that I saw the New York Sun there.

441 Q. In other words, I don't want to put words in your mouth, but after having looked at Page 71 of Plaintiff's Exhibit 2, you believe that it is likely or probable that your source was simply Dr. Eisenschiml's book?

A. "Possible" is the word I would use. The reason being that I can't recall what would have sent me on the track of this. If I could remember something that would have sent me toward it, then I would have looked for it.

Q. Isn't it a fact that you were quite content to rely for that particular reference on the Eisenschiml book?

Mr. Martineau: Will you look at your cards in respect to Quote 50. I seem to have located it in this Quote 50.

The Witness: I don't have that listed here. Wait a minute. That's concerning the barn doors?

Mr. Martineau: That's right, how many barn doors there were.

The Witness: No, I don't have that listed.

By Mr. Gertz:

Q. Are you through with your answer, Mr. Millard?

A. No.

Q. In other words,—you take your time about getting the answer.

442 (Last question read back.)

Q. That's with respect to the New York Sun of February 11, 1917?

A. Here is something that occurs to me and I can't verify it at the moment and that's why I can't make a positive answer on this, but the libraries had somebody in there, the New York Public Libraries has someone with a great deal of interest in history and also considerable knowledge, apparently, because in their files I find that related clippings or related magazine articles have been assembled and bound together and are cataloged that way over here for the convenience of the researcher who is on a particular field. Now I won't say that the Garrett thing is in there. I can't recall that all but in trying to think of an excuse why I might have looked at it, that would be one, but I can't say it.

* * * * *

444 Q. Did you, yourself, see a copy of the Washington National Republican of June 8, 1865?

A. May I find the references—

Q. Plaintiff's Exhibit 1, Pages 23, 24 and 25.

A. Yes.

Q. What is the answer?

A. The answer is yes.

Q. You saw that particular issue?

A. Yes; to the best of my recollection.

Q. Where did you see a copy of that?

A. I believe in the Library of Congress.

Q. Do you remember when?

A. No, I don't. I think, however, that was—in fact, yes—that was on my first research in Washington when I was still on the Baker aspects of the conspiracy which would make it back in about '45 or '46.

Q. Do you recall whether or not in your article you used any references from the National Republican of June 8, 1865 other than those set forth or summarized on Pages 23, 24 and 25 of Plaintiff's Exhibit 1?

Mr. Martineau: You mean quotes?

445 Mr. Gertz: Yes.

The Witness: I think, in spite of the fact that this occurred quite a few years ago and I am hazy on things that happened yesterday, I think that following the reading of it in Dr. Eisenschiml's book, that I looked it up, checked it, read it. What I used from it, I don't remember.

Mr. Martineau: What you used from what?

The Witness: From either the newspaper—

Q. Did you use anything in your article other than what is quoted or summarized on Pages 23, 24 or 25 of Plaintiff's Exhibit 1?

A. I think I would have to refer to my article to refresh my memory on that.

Q. Would you do so?

A. Are you speaking of the original—

Q. I am speaking of the article as printed.

A. No, apparently not.

Q. What made you connect Mrs. Lincoln in any way with the assassination story?

A. Mrs. Lincoln?

Q. Yes.

A. I didn't connect her particularly. I remember,
446 without remembering the source, that in more than one early writing on the subject, by "early" I mean within the first years after the assassination, that she was openly accused of complicity in it by many enemies.

Q. Will you state some of the works in which you saw such accusations?

A. I say I can't remember.

Q. Could you name even one of those works?

A. Well, I'll take a long guess and say that I believe that in the days of going through the Congressional Globe, reading all the speeches on various periods, that at one time or another I encountered that statement on the floor of the Senate made by some Senator there. It was probably hushed up but I also have a recollection of having read in some other source, some old book, that there was open talk on the streets and open suspicion.

Q. Is it not a fact that the first reference you ever saw on the subject of Mrs. Lincoln's connection with the assassination story is found on Page 14 of Plaintiff's Exhibit 1?

A. No, it is not true, without looking at it.

Q. Will you turn to Page 14?

A. Yes. You are referring to her hiring, her letter
447 on Parker. I am not. In fact, my memory of it is that that was not involved at the time; that it went deeper than that.

Q. Do you recall any references to source materials on that?

A. No.

Q. Is it not a fact that the only place you have seen Mrs. Lincoln's letter with respect to the hiring of Parker is following Page 14, on Page 14 and following Page 14 of Plaintiff's Exhibit 1?

A. I have seen this letter, yes, but not the only place I have seen it quoted or seen it referred to.

Q. That letter is part of the O'Beirne papers, is it not?

Mr. Martineau: Are you testifying now? Are you telling him?

A. I don't know. I believe that was stated here before but I have no way of knowing.

Q. Did you ever see the original letter anywhere?

A. No.

Q. And you never saw it in Mr. Eisenschiml's home?

A. No.

Q. Did you ever see police blotter—did you ever see the police blotter in Washington?

448 A. No.

Q. By the police blotter I mean the police blotter relating to the assassination.

A. The Metropolitan Police records for that night. No, I did not.

Q. Did you ever see Forbes' statement that he was in the box the night of the assassination?

A. Yes, I did see that. I looked that up at a later date.

Q. Where?

A. That could have been either Washington or New York. I think New York.

Q. Where in New York?

A. At the library.

Q. You mean the New York Public Library, the Astor Branch?

A. Right.

Q. Was it the original document?

A. No.

Q. Did you ever see the original document?

A. No, I don't believe so.

Q. At the New York Public Library, what Forbes' statements did you see?

A. Wait a minute. Forbes' statement? I am 449-50 thinking of something else. Will you strike my an-

swer to that previously, that library thing? I was thinking of something else.

Q. What were you thinking of?

A. I was thinking of someone or other's eventual publication of memoirs. I know, you are speaking of the statement. No, the statement I have never seen anywhere except in the Eisenschiml.

Mr. Martineau: Let's get this straight. Do you mean the actual statement of Forbes?

Mr. Gertz: Yes.

The Witness: Yes.

By Mr. Gertz:

Q. And the only place you saw it was in the Eisenschiml books?

A. Yes.

Q. And you saw that prior to the writing and publication of your article?

A. I did.

Q. Did you ever see the Riddle papers?

A. No, I don't think so.

Q. Do you know where the Riddle papers are?

A. No.

Q. Or what they are?

451 A. Yes, they are the Albert Gallatin Riddle's recollections or memoirs or something of that nature.

Q. Is it not a fact that the only place you have seen the references used by you is in the Eisenschiml book?

A. I can't say definitely on that. May I have the spot here?

Q. Yes, will you look at Plaintiff's Exhibit 2, Page 71 and Page 379.

A. I see nothing on Riddle here.

Q. Second line from the bottom.

A. Second line from the bottom is the word "house."

452 Q. Did you read the magazine of history of February 1911?

A. I can't answer that until I can find it here.

Q. In spite of Mr. Martineau saying about my trying to confuse you, I really am not.

A. I realize that you are expecting me to remember a distinctly unremembered thing now only by date and the dates are almost meaningless in my mind now. I have to find out what was in there and then I will have some recollection of it.

453 Mr. Martineau: That's right. Whenever he asks you a question about something that you read, take your time and look at it.

The Witness: It is Quote 26 if you want to refer to it.

Q. Can you answer that question now? Do you know what the question is?

A. Yes. I believe I did.

Q. Where did you find it?

A. Failing to remember that, which is what had me hesitate, this dates back from that earlier research before the Baker piece and that's a long time back.

Q. You don't remember where you found it?

A. I don't. See, I went to Chicago. I worked there for a while. Then I came back, worked here in New York, went down to Washington and so somewhere in that round of travel I have a pretty good assurance that I did.

Q. Isn't it a fact that that's an extremely rare publication?

A. I don't know.

Q. Isn't it a fact that you read excerpts from it simply in Dr. Eisenschiml's book, Plaintiff's Exhibit 1?

Mr. Martineau: You mean that that's his exclu-
454 sively?

Mr. Gertz: Yes, exclusive source for it.

The Witness: No, I don't think so. As I said, I believe I read it.

By Mr. Gertz:

Q. Do you remember what you were looking for when you looked up the magazine of history for February 1911?

A. Yes, I was looking up Gleason's story.

Q. Do you remember whether or not you used anything from Gleason's story other than what Dr. Eisenschiml has in "Why Was Lincoln Murdered"?

Mr. Martineau: Do you mean in either one of his pieces on Baker or this piece?

Mr. Gertz: Yes.

The Witness: I couldn't answer that very well until I had reread my Baker piece.

Mr. Martineau: Reread your Baker piece, then.

The Witness: Do you have a copy of it?

Mr. Martineau: Yes, I do.

The Witness: That was a piece of earlier research on Baker.

Mr. Gertz: I will withdraw the question rather than take that time.

455 Mr. Martineau: I am tendering him that piece.

Mr. Gertz: I am withdrawing the last question and only the last question.

Mr. Martineau: All right.

By Mr. Gertz:

Q. Did you read Document No. 9 of the House of Representatives, 39th Congress, 2nd Session?

A. I don't know, but with that identification I wouldn't have the faintest idea.

Q. Did you read any House documents of the 39th Congress?

A. What year was that?

Q. What year do you think it is?

A. I don't know. I take it for granted it is either 1865, 6 or 7.

Q. Will you look at Pages 199 and 200 of Plaintiff's

Exhibit 1. From the three asterisks toward the middle of Page 199 to the end of Page 200.

Mr. Martineau: Is there a question pending or did you just want him to read it?

Mr. Gertz: There is a question pending.

Q. Having looked at those two pages, are you now
456 able to answer whether or not you personally read Document No. 9, House of Representatives, 39th Congress, 2nd Session?

A. Not quite yet. Will you read the question?

(Question read back.)

A. (Continuing.) No, I am not able to answer it. I would have to answer from my memory and it has failed me because what information I did use on here probably came, and I find my notes on it, probably came from either Oldroyd and some of it was also in Harris' book as well as Dr. Eisenschiml's and I don't recall that I went any further into it than the information that is found in those places.

Q. But you do recall that you used Dr. Eisenschiml's book in connection with that article at that point?

A. Well, I didn't say that. I said he was one of the sources, so naturally I read it, yes. I read it all.

Q. Isn't it a fact that your sole knowledge as to the contents of Document No. 9 is from Pages 199 and 200 of Dr. Eisenschiml's book, "Why Was Lincoln Murdered"?

A. No sir.

Mr. Martineau: Has he said anything about Document No. 199?

Mr. Gertz: Document No. 9.

Mr. Martineau: He hasn't said that he had any
457 knowledge of it, has he, as I understand it?

Mr. Gertz: Any knowledge of what?

Mr. Martineau: Of Document No. 9. I think your last question is a little confusing.

Q. What is the full name of L. J. Velasquez?

Mr. Martineau: You mean what do the initials stand for?

Mr. Gertz: Yes.

The Witness: I can say in advance I can't remember. If I wrote it down, I have it. No, I cannot remember.

Q. Do you know who L. J. Velasquez was?

A. She was a woman spy. That's about the extent of my memory of it now.

Q. On which side of the Mason Dixon Line?

A. She was northern, I believe. May I withdraw that. I believe she was a Rebel spy. I haven't seen that book since 1946. That was the time I skimmed through it after Dr. Eisenschiml's tip on it.

Q. Where did you see that book?

A. That, as I said last night, is a matter I can't remember. Whether it was in Chicago, in Angle's office or in Washington, I know it was not in New York.

458 Q. Where in Washington?

A. I would suppose the Library of Congress.

Q. But this is all surmise on your part?

A. Yes, it is.

Q. Will you turn to Page 119 of your article, Column 2, Paragraph 5. Do those italics appear at the end of the Velasquez book?

A. I have since found out no or been told no. I would not have any memory of it myself. These particular italics I put there myself for my own particular specific purpose, regardless of whether they appeared in the original or in anyone else's book.

Q. Is it not a fact that the italics do not appear in the original book but do appear in the Eisenschiml book "In the Shadow of Lincoln's Death"?

A. I do know they appear in the Eisenschiml book. I do not remember whether or not there were any in her book.

Mr. Martineau: You mean the identical italics or just some italics appear in the Eisenschiml book?

The Witness: The italics are not identical. I used italics solely to emphasize.

By Mr. Gertz:

Q. What else besides what is quoted on Pages 73 459 and 74 of Eisenschiml's "In the Shadow of Lincoln's Death" does L. J. Velasquez say with respect to the assassination, so far as you recall?

A. I have no recollection now.

Q. Do you recall anything else that she says?

A. No. As I say, I had hoped to do a story on her. I skimmed through that part dealing with Baker who was the man I was researching at the moment and when the idea of the story was killed, I wiped it out and forgot it, hung on to the one—

Q. How long a book is it?

A. I don't know.

Q. Approximately?

A. I can't even see it. I have no recollection.

Q. Where was it published?

A. I don't know.

Q. When was it published?

A. I don't know. I can look it up. I do have that.

Mr. Martineau: Look it up. Have you got it here?

The Witness: Yes.

Mr. Martineau: Look it up.

The Witness: It was published in New York by 460 the Worthington Company in 1890.

By Mr. Gertz:

Q. Besides the material on the assassination, what other material is there in the Velasquez book?

A. To the best of my memory it is merely her deeds and spy and courier work.

Q. Do you remember any chapter headings of the book?

A. No.

Q. Even one?

A. No. As I say, I can't even remember the book.

Q. Do you remember any particular incident or episode of any kind or character from the book?

Mr. Martineau: You mean other than this thing set forth here?

Mr. Gertz: Yes.

A. No, not with any clarity at all.

Q. Even hazily?

A. I am thinking of two incidents that are undoubtedly not even from her book and why they should be associated with it in my mind, I don't know.

Q. What are they?

A. One is a matter of a skirt full of quinine being smuggled. Another is some connection with Baker's
461 embarrassing arrest of a minister and his daughter who were trying to get back to the Confederacy and they were related to somebody of importance in Washington. Now that may not be from the book. As I say, I don't even think it is, but those are the only two things that pop into my mind.

Q. Aren't those from Baker's book?

A. That may be.

Q. Did you ever see a copy of the Washington Sunday Gazette of October 28, 1883 and November 4, 1883?

A. I find nothing here on it.

Q. Is it not a fact that you never saw either the said issues of the Washington Gazette, the Washington Sunday Gazette?

A. I can't answer that at the moment until I know what they are about.

Q. Is it not a fact that the only copies of the said issue are in the possession of Dr. Eisenschiml?

A. I wouldn't have any way of knowing that. I am sorry.

Q. Would you look at Page 179 of Plaintiff's Exhibit 1 and also look at Page 129 of Plaintiff's Exhibit 2. Have you looked at both of those references?

A. Yes.

Q. Do they refresh your recollection as to whether
462 or not you have ever seen a copy of the said two publications?

A. I don't even get the connection between the subject here and the papers.

Q. Will you look at your article on Page 119, Column 2, the last four lines.

Mr. Martineau: That's Quote 54.

The Witness: I can't answer your question about the papers, those particular papers because I can't remember them at all.

Q. Isn't it a fact that your only knowledge as to the contents thereof is derived from the two Eisenschiml books?

A. No, that's not a fact.

Q. But you don't know where else you saw it?

A. I don't know where else.

Mr. Martineau: You mean where else he saw papers?

Mr. Gertz: Yes.

The Witness: I am quite certain that I saw the papers. I saw a great many papers on that period.

Q. And you don't know where you saw them?

A. Most of them in Washington.

Q. Is it possible that you are mistaken?

A. Yes, quite possible.

463 Q. And it is possible that actually you did not see the papers?

A. No, it is not possible that I did not see them. It is possible I am mistaken if you were to pin me down to a specific date.

Mr. Martineau: Let me get this straight. Does he say in his book that he saw any papers, any newspapers?

Mr. Gertz: You see—off the record.

(Discussion off the record.)

By Mr. Gertz:

Q. Where did you get the information contained in those last four lines?

Mr. Martineau: Read the last four lines.

The Witness: It was my impression and still is that that is a statement that has been mentioned by a great many writers.

Q. Who, for example? Can you name one?

A. The closest I came was running across that quote from Baker about attorneys expecting a reprieve and walking up and down which is not a very direct answer to your question.

Mr. Martineau: You said a quote from Baker. Is that the one you referred to last night?

464 The Witness: That's right.

By Mr. Gertz:

Q. Do you know any positive statement by anyone that a promise of clemency was held out to Mrs. Surratt?

A. Yes, I remember, but I do not remember the source except I am fairly positive that it was a statement made to her daughter. I started to say and I am still trying to pin it down—

Q. By whom?

A. That, I can't tell you.

Q. Do you know any place other than the Washington Sunday Gazette of those issues where the statement was made in positive terms?

A. I don't even know that it is made there. I have no recollection of it, of where I got it.

Q. Did you look at those pages I referred you to in the

Eisenschiml books, Page 179 in Plaintiff's Exhibit 1 and 128 in Plaintiff's Exhibit 2? Have you found the places?

A. Yes, I have them both here.

Q. And there are in those two books by Eisenschiml references to the promise of clemency?

A. Yes, I see that mentioned. I am thinking of something, I can't back this up and I don't have the book, but some of my information on that I remember one source of it was Stefan Lorant.

465 Mr. Gertz: You have turned over to me, Mr. Martineau, Defendant's Exhibit 6 for identification.

Mr. Martineau: Right.

Q. Will you examine that document, Mr. Millard. Does that represent the reference to Lorant, about which you just testified?

A. No.

Q. Which reference to Lorant did you have in mind, Mr. Millard?

A. I don't even know. I said, if you will remember—my answer was that in the back of my mind is a thought that a—one of the sources might have been Lorant, but I know that he had considerable material on the trial, with particular emphasis on Mary Surratt. This is not that. I mentioned to you, not as testimony, that one of the reasons I had it was because of this final picture, which I described briefly here, since it was a borrowed book, and I had a hunch that I might lose it before I got around to—or might have to give it back before I could use the reference there.

Q. Is Lorant considered an expert in the field?

A. I don't know.

Q. Is he not simply a collector of photographs?

466 A. Well, I don't know. I'm really not a critic on what he's done, really a critic on that. He's done,

I understand, some things that are considered pretty good outside the line of photographs.

Q. I think I asked you this, but I want to make certain of it:

Where did you see Mrs. Lincoln's letter to O'Beirne with respect to Parker?

A. We have covered that a couple of times, but I will say again: the only time I have ever seen a copy of it is in Dr. Eisenschiml's book.

Mr. Martineau: Didn't you say you saw it in Sandburg, too?

The Witness: No, I said it was quoted in Sandburg, but the only place I saw a facsimile of the original—

Mr. Martineau: Is that what you wanted, Mr. Gertz?

Mr. Gertz: Yes. The letter itself.

Q. Where did you get the name of the bartender, Michael Henry?

A. Do I have a bartender, Micheal Henry?

Q. Will you look at page 112 of your article, column 467 one, paragraph four. Have you found the place?

A. Yes. I have found it.

Q. Do you find the bartender?

A. Yes. I find the bartender, Michael Henry.

Q. Where did you get the reference?

A. I don't know. Give me a moment.

Q. Surely.

Mr. Martineau: Is that one of the things that you claim as an infringement here?

Mr. Gertz: Yes.

Mr. Martineau: Which item is it?

Mr. Gertz: I don't know.

Mr. Martineau: I am going to object and instruct him not to answer any questions other than what you claim are matters relating to infringements listed in this answer of Dr. Eisenschiml.

Mr. Gertz: I have a whole series here.

Mr. Martineau: But I want you to point out which series this is.

Mr. Gertz: If you want to be here a long, long while

Mr. Martineau: I insist on it, because we could be here for a thousand years on this. I don't remember
468 anything about any bartender, not in his book, anyway, Mr. Gertz.

Mr. Gertz: I am going to insist upon an answer to that question.

Mr. Martineau: I am going to instruct the witness not to answer.

Mr. Gertz: That question?

Mr. Martineau: Yes, sir. I am going to instruct the witness not to answer any questions concerning any items that are not specified in that affidavit, anything not claimed therein to be an infringement—

Mr. Gertz: Do you construe this affidavit to be a limitation?

Mr. Martineau: I certainly do.

* * * * *

469 Q. Where did you get the information that Booth had relatives in Manchester, New Hampshire?

Mr. Martineau: Take your time, Mr. Millard, and look at his bill or particulars there, those sixty-six quotes, and then look at whatever else you want, to refresh your recollection, and tell us.

A. No. 2.

Q. Where did you get that information?

A. From, I believe, the reports of the Bulter investigation.

Q. Where did you see those?

A. Either in the archives—in Washington, either in the archives or the Library of Congress, and that I can't tell you surely—for sure.

Q. Did you ever read the Boston Sun-Post of April 11, 1915?

A. I don't know.

Q. Would you look at page 106 column two, paragraph two of your article. Is that reference to "for the sake of speed" in one of the quotes?

470 A. It is; yes.

Q. Do you want to state which one it is?

A. It's either 10 or 11. I'm not sure which one you are referring to here. I find no reference to the Boston Post on either card, so I don't know, is my answer.

Q. Will you look at page 38 of Plaintiff's Exhibit 1. Have you looked at it?

A. Yes.

Q. Does that refresh your recollection?

A. Since I didn't use that statement, the statement that is apparently taken from the paper, I would guess, without saying it flatly, that I probably didn't see it.

Mr. Martineau: Did or didn't?

The Witness: Did not.

Q. So that your only knowledge of it would be—

A. Knowledge of what?

Mr. Gertz: Let me rephrase this question. I withdraw that last question.

The Witness: You are apparently talking about something I didn't say.

Mr. Gertz: Let me rephrase it.

Q. Do you know of any reference, other than the Boston Sun-Post, of April 11, 1915, as to what Eckert was 471 doing at the time of the assassination?

A. That's in "The Great American Myth", I know, for one. No. Apparently not.

Q. But you have not read the Boston Sun-Post of April 11, 1915?

A. I don't recall.

Q. Will you turn to page 117 of your article, column two, paragraph four.

A. All right.

Q. Have you found—

Mr. Martineau: 117, did you say?

Mr. Gertz: Yes.

Mr. Martineau: Which one of the quotes is that, Mr. Gertz?

The Witness: 35.

Q. Where did you get the entry in the O'Beirne diary about his pursuit of Booth?

A. Will it shorten this if I write out my answer to that one? We've gone through that four times today.

Mr. Martineau: Go ahead. This may be the last time.

A. I got that, as I believe I said before, the exact quote, from Dr. Eisenschiml. I've made that statement now 472 several times.

Q. All right.

A. The facts without the direct quote, however, are found in other sources.

Q. Where?

A. Oldroyd, for example, pages 101 to 104. Now, let's see if I can get the pages on the others. I don't have them on the card.

Townsend, page 56. Coggershall, pages 59 to 63, and Laughlin, page 128, for a few examples. There are others, too.

Q. All right, now. Turn to page 117 of your article, column two, paragraph two.

A. All right.

Q. Where did you get the story of the men on crutches?

Mr. Martineau: I think last night, Mr. Millard, you said that was one of the sources you were going to check, when I asked you about it.

The Witness: Yes. It was one of the ones I couldn't remember.

Q. Will you turn to page 103 of Plaintiff's Exhibit 1, lines 9 to 11 from the bottom, bearing also in mind page 117, paragraph two, column two of your article.

473 A. Yes.

Q. Does that refresh your recollection?

A. No.

Q. Is it not a fact that the story of the men on crutches appears exclusively in the O'Beirne papers?

A. No, sir; that is not a fact.

Q. But you don't know where else?

A. I don't know where, but I can say definitely that is not a fact.

Q. All right. We won't labor the point. Did you read the Atlantic Monthly for April 1930?

A. I don't know.

Q. Would you look at page 106 of your article, column one, at the bottom.

A. Yes.

Q. Does that refresh your recollection?

A. No. I see nothing about the Atlantic Monthly here, so I'm still at sea, until I find the particular point.

Mr. Martineau: Which quote is ——? Do you know?

The Witness: Quote No. 9.

Q. Do you know of any account of what Stanton did on the evening of the assassination, other than the

474 Atlantic Monthly for April 1930?

A. Yes.

Q. Will you state which ones?

A. I will. Oldroyd, "The Assassination of Abraham Lincoln", page 53, says:

"* * * and a large crowd proceeded to the residence of Secretary Stanton and serenaded him."

The other is the other—I see now I did read from the Atlantic Monthly, which goes into more detail on the situation about the incident.

Q. Do you have any other sources?

A. I have no other sources recorded here.

Q. All right. This is one thing that you said last night you were going to check further. Where did you get the idea that Booth fired his shot at 10:13 p.m.?

A. That I haven't checked since I've been here.

Q. So you don't know?

A. I don't know yet.

Q. Isn't it a fact that the one and only place where that hour is given is in the Eisenschiml books?

Mr. Martineau: You mean, the hour and minute?

Mr. Gertz: Hour and minute.

A. I would doubt it very much.

475 Q. Will you look at page 353 of Plaintiff's Exhibit 2, please.

A. I haven't had the opportunity, but I will hold to my belief that there are other sources.

(Discussion off the record.)

Q. Did you read the Baltimore American of 1902—

A. The same answer: I have no idea.

Q. Will you look at your article, page 120, column one, paragraph three, from the bottom?

A. Yes.

Q. You did read it?

A. Yes. I did read it.

Q. Where did you read it?

A. I believe here in New York.

Q. Where in New York?

A. At the newspaper branch of the Library.

Q. Where is that? At 42nd Street and Fifth?

A. No. That's downtown somewhere.

Q. Do you remember when you read it?

A. No.

Q. Do you remember if there is any identification other than the Baltimore American of 1902?

A. No.

* * * * * *

477 Q. Mr. Millard, in attempting to recreate the sources for your manuscript, is it not a fact that you found material which you put on the various cards that you have been using here which actually were not source material for the original manuscript at the time you 478 wrote it?

A. Yes, I think in some few cases that was so.

Mr. Martineau: It was not source material for the article; is that the idea?

Mr. Gertz: Yes.

Q. And in general, in preparing the cards, you have tried to reorientate yourself as to the kind of material that you used in order to write the article?

A. Well, yes. I tried to chiefly recall what I did the first time, and put down as closely as I could some of the material.

Q. You depended a good deal upon memory, didn't you?

A. Yes.

Q. Did you also depend upon the affidavit of Dr. Eisenschiml?

A. Yes.

Q. In other words, what you did in part was to take Dr. Eisenschiml's affidavit and see what you could find that was recalled to your mind by the statements made in his affidavit with respect to alleged infringement?

A. That's right. I had very little time at my disposal.

Q. Prior to the publication of your article, did anyone at Fawcett talk with you or ask you about the sources and credits for your article?

479 A. Not that I recall.

Mr. Gertz: I wonder if I can have that document brought in by Mr. Daigh.

Mr. Martineau: Yes.

(Mr. Martineau hands document to Mr. Gertz.)

Q. Mr. Millard, I show you the document marked yesterday for identification as Plaintiff's Exhibit 3 and ask you to examine it. Have you ever seen that before?

A. Not to read it. I have seen the original, I believe, attached to the manuscript in the True office when I had been in there a time or two.

Q. Do you remember when you saw it?

A. No. Those are not normally shown to the writer. In fact, he is not supposed to see what the editorial comments are. That's for inter-office circulation. That's why I took time to read it more carefully to see what they had said.

Q. Did you discuss with anybody at True the submissions of your article to one or several noted Lincoln historians for their comments?

A. I think the matter was mentioned; not discussed.

Q. Mentioned to whom?

A. To me.

Q. By whom?

480 A. Somewhere in talking there at the office, someone said "This is what we ought to do".

Q. Do you remember who said that?

A. No.

Q. Was it Mr. Naughton?

A. It may have been. I have a feeling it was—

Q. —Mr. Purdy?

A. It wasn't Purdy. Purdy wasn't in on any of these. He rarely is.

Q. You talked and communicated with Mr. Naughton with respect to this article, haven't you?

A. Yes.

Q. And with Mr. Purdy, Ken Purdy?

A. No.

Q. You have never had any contact with him at all?

A. Ken doesn't even know me on sight, I don't think.

Q. Prior to the publication of your article, did you ever have any conversations or communications with Mr. Daigh?

A. No.

Mr. Martineau: You mean about the article?

Mr. Gertz: Yes, that's right.

A. No.

* * * * *

482 Q. I was a little confused yesterday, Mr. Millard, as to whether your article was commissioned or whether you just wrote it and then submitted it? Will you state just what it was?

A. True has a very loose form of commissioning something, you might call—I say, you might call it that. What they do is approve the idea that you have submitted for a story and from then on you are on your own. If you
483 write it successfully enough you sell, but it is not an order or a commission. It is merely an approval in advance before you get too much work done, which was done in this case.

Q. And that loose commission, as you call it, was given to you by Mr. Naughton?

A. That's right.

Mr. Martineau: Would it help to state what conversation you had with him, just so I won't have to go over it? That's what you want, isn't it?

Mr. Gertz: Yes. As a matter of fact, off the record * * *

(Discussion off the record.)

Q. Will you state the conversation with respect to the

commissioning that you had with Mr. Naughton, first stating the time and place of such conversation?

A. The time, as near as I could fix it, would be some time around June of 1951. It was in the forenoon when Tom called me by telephone and I remember only the first words "I have got news for you. We are finally going to let you go on that Lincoln piece that you have been yelling about for years, if you want to do if. We have an O. K. on it". So any conversation from then on was
484 more or less just a discussion. I don't remember that, but I do remember his method of announcing it to me.

Q. And it was over the telephone?

A. Yes.

Q. If you expected to have the manuscript issued in book form, how did it happen that you destroyed your notes?

A. What happened was—

Mr. Martineau: I object to the question as being very argumentative.

Mr. Gertz: It is in the form that—maybe I better rephrase it.

Q. You expected to have your manuscript published in book form, did you not?

A. Originally hoped to, yes.

Mr. Martineau: You mean hoped as distinguished from expected; is that your point?

A. (cont'd.) At one time I think I expected.

Q. Did you know that book publishers required your sources and credits before they would publish?

A. Oh, yes. My reason—do you want me to answer your first question, which I can do very simply:

* * * * *

485 A. The reason I destroyed my notes was simply that after I put in my four or five and a half months of toil and struggle on this and lost my shirt in the process due to the amount of money paid for it, I decided that no

more of this; that the amount of work involved in expanding this to a book and in adding the bibliography, footnote necessary, would never possibly pay out and I couldn't afford it as a hobby. I had plunged into other stuff and
tried to recover the money that I had not made
486 during that period. So with my wife's hearty agreement, I abandoned the project.

Q. I show you document marked for identification, Defendant's Exhibits 5 and 6, and ask you to examine them. Would you say that those are characteristic of the notes that you took in preparation for your article?

A. I would say that they are more elaborate and more readable than most of the notes I took for the article.

Q. Most of your notes were on scraps of paper?

A. Yes.

Mr. Martineau: I think he testified they are on scraps of paper, cards, envelopes, and everything.

Q. And you wouldn't call them complete notes?

A. No.

Q. They were simply jogs to your memory?

A. Yes, that's right. I never bothered to—bothered to write on that except, for example, what books I referred to I knew, but nobody else would ever get any good out of it, I don't think.

Q. Is this a fair summary of the method used by you in doing your article? You read from about ten to fifteen
books per day hurriedly and tried to absorb their
487 contents and then more or less from memory you would write?

A. Not completely from memory. After reading these books, then the story I wanted to write would begin to form in my mind. Then I would know from that what I needed to have more specific information on it. Then I would go back to take more specific notes on things, unless something hit me in the first general reading. I usually don't take notes then.

Q. Generally speaking, though, your desire was to absorb the material so completely that it became yours?

A. Yes.

Mr. Martineau: What do you mean by that, became yours?

Mr. Gertz: That you knew it without reference to sources or anything else; that you could retell the story; you had the feeling of it; you had the facts of it, and in the process you forget or tended to forget the sources.

A. No. Up until the end you had me with you; not to forget the sources. And when you speak of facts, not detailed facts. I had the form of the story and the
488 general background of the story. I had enough to write perhaps a third of it without any further checking, but anything involving specific data would have come in for more careful research.

Q. Is it possible that in the process of absorbing your material you tended sometimes to forget where you got it?

A. Not at that time, I don't think.

Q. Later?

A. Since then, yes.

Mr. Martineau: You mean not at the time of writing or composing?

A. Not at the time of writing.

Q. Is it possible that in your absorbing of material you tended to forget that you got some of it from the Eisenschiml books?

A. Oh, I got some of it from the Eisenschiml books.

Q. But is it possible that you got some that you now are not aware of that you got from the Eisenschiml books?

A. Yes, that's possible.

Mr. Martineau: When you say some of it, you mean the material as distinguished from the language, as
489 he has testified; is that what you mean?

Mr. Gertz: Material, substance, maybe even language.

A. I don't think language.

Mr. Martineau: You don't think language what?

A. I don't think language was even inadvertently taken from anyone.

Q. Are you aware of any striking statements or language that may have stock to your memory?

A. No.

Q. Would you look at your article on Baker that appeared in the July 1947 issue of True?

Mr. Gertz: Have we marked that for identification?

Mr. Martineau: I don't know whether we have or not. This is our copy.

(Copy of True offered.)

Mr. Gertz: Will you mark the July 1947 issue of True with the next number?

(Copy of True magazine, July 1947, marked Plaintiff's Exhibit 4 for identification.)

490 Q. I show you this document marked for identification as Plaintiff's Exhibit 4, being the July 1947 issue of True, and ask you if you are familiar with the article therein written by you on Baker, Lafayette—

A. Which?

Q. Baker.

A. I am.

Q. Have you had occasion to go through that article since suit was filed here?

A. No, I haven't. In fact I don't even have my copy of it. I seem to have lost it somewhere.

Q. Will you turn to page 75?

A. Yes.

Q. Will you turn to the top of column 1 there. Do you see the language "Mr. Otto Eisenschiml of Chicago, the outstanding authority on Abraham Lincoln's death, has devoted a lifetime of intensive research to the subject. His two books Why Was Lincoln Murdered? and In the

Shadow of Lincoln's Death are packed with his own sensational discoveries."

A. Yes.

Q. What did you have in mind when you referred to Dr. Eisenschiml's "own sensational discoveries"?

491 Mr. Martineau: May I make this objection, that I don't understand that there is any claim that this infringed anything, this particular article.

Mr. Gertz: No. I don't know why I have to explain, but this is pertinent. I will be willing to argue it. This is completely pertinent to the present suit.

Mr. Martineau: All right. Just answer him fully now. My objection still stands, but I don't want to repeat things here.

Mr. Gertz: I don't want to take the time to argue here.

Mr. Martineau: I don't either.

A. Your question was, I believe, concerning what I meant by "His own sensational discoveries"—

Q. With which his two books were packed?

A. I think in my mind specifically at the time—that is what I think of now in that connection—was the identity of the folder used as Exhibit A in the trial of the assassins, and there was another item in my mind that's gone now. There are two things that stand out.

492 Mr. Martineau: You better run through the article.

Q. You look through it because I want to call your attention to the word "packed" with his own sensational discoveries. What do you mean by the word "packed"?

A. Filled.

Q. Two items wouldn't mean filled, would it?

A. No.

Q. So you obviously meant a number of items, didn't you?

A. Yes, sure.

Q. Would you run through and tell us what you meant by the quotation that we have just read to you?

A. I meant, I think, Dr. Eisenschiml is a very fine man and I think everyone should read his books.

Q. I don't want to argue with you, Mr. Millard, but you obviously—

Mr. Martineau: You asked him what he meant and he is telling you. That's a responsive answer.

A. That's the reason it was in there. It is to pay a little tribute.

Q. Didn't you mean a lot—large number of specific 493 items used by Dr. Eisenschiml's two said books?

A. I presume so.

Mr. Martineau: Specific items from what? Historical discoveries? Make it clear.

Q. With respect to the assassination story.

Mr. Martineau: You mean that Dr. Eisenschiml discovered for the first time or announced certain historical facts?

Mr. Gertz: I want him to tell me what he meant.

Mr. Martineau: He told you what he meant. He was giving Otto a plug. Isn't that what you meant?

A. Yes.

Q. Isn't it a fact, from that point on in the said article that you are looking at, you itemized a large number of the sensational discoveries of Dr. Eisenschiml?

Mr. Martineau: It is understood my objection runs to all this line, of course. Go ahead, now. Read through it carefully.

Mr. Gertz: Temporarily, without withdrawing that 494 question, I will hold that question in abeyance.

Q. Did you mean by the statement with respect to the sensational discoveries of Eisenschiml, the items in paragraph 20 of the Eisenschiml affidavit and sub-paragraphs A to O thereof?

A. I am sorry. May I make a note? I only half heard you, and now that you have finished I don't know what

you said. May I make a note here and clear my mind of this and then listen to that again?

Mr. Gertz: Surely.

495 A. Not entirely, because I see some items in here that I don't think are Dr. Eisenschiml's discoveries, sensational or otherwise, since they are rather common knowledge, and others I would not class as discoveries.

Q. Did you mean any of the items in A to O, both inclusive, of the said paragraph?

A. As far as I can see, there are one or two items in there that might be considered discoveries. Your phrasing of the question was did I consider it so. No, I did not.

Q. I don't mean at this moment. I mean, did you when you wrote this article?

A. No.

Q. Now which ones did you consider the sensational discoveries of Dr. Eisenschiml? Identify them simply by sub-paragraph numbers.

A. I would say item L, which refers to Parker; items I and J, and item G.

Q. And none of the others?

A. No. None of the others, I don't think.

Q. Did you consider anything else whether or not 496 enumerated in the said paragraph as being Eisenschiml's own sensational discoveries?

Mr. Martineau: Wait a minute. I am completely befuddled. You mean anything else where?

Mr. Gertz: Any where that is in the two books of Eisenschiml as his own sensational discoveries.

Mr. Martineau: In other words you have taken him through this paragraph 20, A to O, and he has picked out something that he said he would consider as Eisenschiml discoveries; right?

Mr. Gertz: Yes.

Mr. Martineau: Now you are asking him something anywhere in the world outside of this paragraph?

Mr. Gertz: Yes, because I am trying to get at the meaning he had in that language and I think I am entitled to get it because of the use of the word "packed"; the word "packed" as a particular—

Mr. Martineau: There is my general objection which I am not urging again at this time, but I mean—

497 Mr. Gertz: Can you answer that question?

A. Not in relation to that. I simply wrote something. My fingers flew. I paid a tribute to the guy. Now I am supposed to back it up with documentary evidence.

Q. Did you in the article single out anybody else for that kind of praise?

A. No, I did not.

Q. Did you mean by the language that we have quoted from page 75 of your article the items included in paragraph 19 of the Eisenschiml affidavit, particularly subparagraphs A to H inclusive?

• • • • •

498 A. A few of them, yes.

Q. Which ones?

499 Mr. Martineau: List them by the letters.

Mr. Gertz: List them simply by the sub-paragraph letters.

A. I would say item G, item H, item I, item N, item T, item U, item V, item GG, item HH. I believe I skipped X.

Q. In other words you mean item X?

A. I mean to include that, yes.

Q. Anything else?

A. No. You are asking me a confusing question.

Mr. Martineau: Let's make sure you understand the question.

Q. Mr. Millard, didn't you also mean to include EE of that?

A. No. I will tell you why. Simply that you are asking me to say that nobody ever heard of these things until Dr. Eisenschiml wrote them in his book, which are not true.

Q. I didn't mean to ask you that. I meant to ask you in all of these questions what you meant by the quotation from the top of page 75 of your article?

Mr. Martineau: He has told you three times what he meant. He said he intended to give a plug and praise to Dr. Eisenschiml. Why badger him about it?

Q. Let's go on to the article itself. Did you mean 500 to include—maybe you better make a note so you could check it—the material on page 75 of the said article, column 1 thereof, paragraph 2, and the last three paragraphs in column 1 and the first seven paragraphs in column 2?

Mr. Martineau: On Page 75?

Mr. Gertz: Yes.

Mr. Martineau: Have you got that all in mind now?

A. I have got the columns in mind. What I don't have in mind is exactly what you want me to say about them.

Mr. Gertz: Will you read the question?

(The question was read back.)

A. I shall make an answer that I will continue from here on on this particular point. I meant nothing. Therefore I can't refer to it there, to anything else special.

Q. Did you mean any of the material that appears on the last page of your article of July 1947?

A. I meant nothing by it further than a tribute to Dr. Eisenschiml.

Q. Will you turn to the last page of your article of July 1947. Did you mean any of the material on that page?

A. I meant Dr. Eisenschiml is a great man.

501 Q. I call your attention to the fact, towards the bottom of column 1, the last page of your article of

July 1947, you have this language "A few years ago, digging into War Department Archives, Dr. Eisenschiml, the Lincoln authority, came upon a shocking find". Then you go on to tell of Booth's photograph, Exhibit 1.

A. I think I have already testified that that was an item I could have meant if I meant anything at all.

Q. In your article in the February 1953 issue, you didn't directly credit Dr. Eisenschiml did you?

Mr. Martineau: That speaks for itself, doesn't it? Why badger him about that.

Q. Do you know of any reason why you did not refer to Dr. Eisenschiml when you used that material in your article?

Mr. Martineau: Now, just a minute, please. He has already identified his manuscript, which shows that he did refer to Dr. Eisenschiml.

Mr. Gertz: Not in connection with that, and the references to Dr. Eisenschiml.

Mr. Martineau: How silly are we going to get? We are getting down to splitting up fly specks.

502 Mr. Gertz: Will you repeat the question?

(The question was read back.)

A. Very good reason. I referred to no one in regard to material. I was cramped for space. The manuscript had to be cut. The magazines don't run bibliographies and therefore I did not include any source material as source material.

Q. Will you turn to Exhibit C of the Eisenschiml affidavit. Look at item 1.

A. I am.

Q. Will you compare that with item 1 in the Eisenschiml column?

Mr. Martineau: Now just a minute. Whatever it is, it speaks for itself. Are you asking his opinion as a literary expert?

Mr. Gertz: I have asked him just to look at something.

Mr. Martineau: You asked him to compare it. That means, tell us whether there are differences or agreements.

Mr. Gertz: I didn't use the right words.

Q. Did you look at both of those items?

A. I did, yes.

Q. Do you find any similar language?

503 Mr. Martineau: Are you now asking his opinion as an expert?

Q. Do you find any similar language?

Mr. Martineau: I object to the question. Whatever the language is, it speaks for itself and it is a question for the Court to determine. Go ahead and answer. I just want to put my objection in.

A. No, I don't.

Q. Where did you get the language "Forty miles from the nearest railroad or telegraph"?

Mr. Martineau: You understand this question calls for language now; not substance.

Mr. Gertz: I am talking about language.

A. I am talking about language. I presume I couldn't think of any other way to express the fact at the moment of writing.

Q. Turn to quote 2.

A. I have.

Q. In both columns. In each instance now it will be both columns.

A. Yes.

Q. Where did you get the language of your item 2?

A. I imagine I was born with it.

504 Mr. Martineau: Do you mean to say that the language is your own?

A. The language is my own. Part of my ability, if any, in writing.

Q. It's not a paraphrase from Dr. Eisenschiml's language?

A. It is not.

Q. Or quote?

A. Not a quote.

Mr. Martineau: It's perfectly obvious it's not a quote. Anybody can see that.

Mr. Gertz: Anybody can see the opposite, but lets not argue now.

Mr. Martineau: Ask him sensible questions here. What's the use of badgering the witness and wasting all our time with a lot of nonsense.

Q. Now you look at item 3.

A. I have.

Q. Is any of the language in that taken from item 3 of Eisenschiml?

A. No, sir.

Q. Look at item 5.

A. Yes.

505 Q. Is any of that language taken from Eisenschiml?

A. No.

Mr. Martineau: You mean item 5 of the witness'—

Q. Is item 5 of the Millard column taken from item 5 of the Eisenschiml column?

A. It's not.

Q. Look at item 11.

A. I have.

Q. Is any of the language in your item 11 taken from Eisenschiml item 11?

A. It was not.

Mr. Martineau: Why don't you say quote. We said quotes before, remember? It's understood when he says item, it is what we called quotes before.

Q. Look at quote 12.

A. I have.

Q. Is any of your quote 12 taken from Eisenschiml quote 12?

A. It is not.

Q. Do you know any reference which directly refers to 3 telegrams or messages in the context of those two 506 quotes?

Mr. Martineau: This is another question. This is now as to the material or idea or historical fact. You mean the word "three"?

Q. "Only three?"

A. "Only three" are words that appear in both quotes. I am afraid I must admit those two words are similar.

Q. And you know of no other work in the field where that reference appears?

A. Now you're still on language.

Q. Yes.

A. I have completely forgotten David Homer Bates Language, so I can't answer then.

Mr. Martineau: Have you got Homer Bates language here?

A. Yes, I have. No, I don't have his language on that here.

Q. Look at your quote 13 and Eisenschiml quote 13.

A. I have.

Q. Did you see any of the language of your quote 13 come from the Eisenschiml quote 13?

A. It does not.

Q. Would you regard this language as "profane, 507 coarse, and insolent language" as taken from the Eisenschiml language, quote "violent, coarse, and insolent language"?

A. No, sir.

Mr. Martineau: I see there is a word "the" there. Did you get that from Dr. Eisenschiml?

A. I may have. That I am not sure.

Q. Will you look at your quote 14 and compare it with Eisenschiml's 14?

A. I have.

Q. Did you take any language from Eisenschiml at that place?

A. I did not.

Q. Did you take this language "Kicked by a man he was trying to arrest" from any similar language used by Eisenschiml?

A. I did not.

Q. Look at your quote 20 and compare it with Eisenschiml quote 20.

A. I have.

Q. Did you take any language from the Eisenschiml quote?

A. No.

Q. Do you have an explanation as to how the phrase 508 "Now, of course" appears in both in the same context?

Mr. Martineau: I object to the question. You are assuming that it needs an explanation. It doesn't need an explanation if he didn't take the language. They are parts of the English language, so it doesn't need an explanation. You assume that it does. You are assuming something that isn't a fact, trying to get the witness to say it.

Q. Did you answer it?

A. No.

Q. Will you answer it?

A. No.

Mr. Martineau: You mean the answer is no?

A. The answer is no.

Q. Will you look at your quote 29 and Eisenschiml's quote 29?

A. I have.

Q. Did you take any of the language of the Eisenschiml quote?

A. No.

Q. Did you take your language "Rushing out, he
509 quickly wired his paper" from similar Eisenschiml language?

A. No.

Q. Will you look at your quote 34 and Eisenschiml's quote 34?

A. I have.

Q. Did you take any of your language from the Eisenschiml quote?

A. No.

Q. I call your attention to the language "Lizzie was promptly discharged".

A. No.

Q. Did you take that?

A. No.

Q. Will you look at your quote 34A and Eisenschiml's quote 34A?

A. Done.

Q. Did you take any of that language?

A. No.

Q. Will you look at your quote 35 and Eisenschiml's quote 35?

A. I have.

Q Did you take any of that language?

A. Yes, sir.

510 Q. What language did you take?

A. The quotes within the quotation marks.

Mr. Martineau: Read it, will you, to make the record straight.

A. "Sam'l Cox, his mill servant, states to another * * *

that Cox had been cooking provisions lately and carrying it to persons down in the swamp * * *."

Q. Did you also take the words "That close O'Beirne came to making the capture then"?

A. I don't find it here. I did not. However—

Q. Do you say it is not—

A. It is not on mine.

(Discussion off the record.)

A. The answer is no. I have the question in mind.

Q. You didn't take that language?

A. No.

Q. Isn't the language almost identical?

Mr. Martineau: I object to that. It speaks for itself.

A. I have no opinions on that matter.

Q. In other words you don't know how the language happens to be similar?

A. I know how it happens to be similar, yes.

511 Q. How does it happen to be similar?

A. Because we were speaking of a very small point there and one is rather limited in the language that can be applied.

Q. You think that's the only language which could have been used?

A. No, not the only; just the language I happened to use there because it seemed appropriate and fitting and fitted the style of writing that I was using through here.

Q. Will you look at yours and Eisenschiml's quote 36?

A. I have.

Q. Did you take any of that language?

A. No.

Q. Look at yours and Eisenschiml's quote 37.

A. I have.

Q. Did you take any of that language?

A. No.

Q. Or any of the manner of presentation by way of italics?

A. No.

Q. Look at your and Eisenschiml's quotes 39?

A. I have.

512 Q. Did you take any of that language from Dr. Eisenschiml?

A. No.

Q. Did you find any other diaries than the Bates and Browning ones referred to by both you and Eisenschiml on that point?

A. I have no listing on it. I don't know now whether I found others or not at the time.

Q. In Bates and Browning, did you find any material or language other than that quoted by both you and Eisenschiml?

A. There was a good deal of language in there.

Mr. Martineau: Good deal of language in where? In Bates and Browning?

A. Yes.

Q. Did you use only the language—

A. I used only the quotes.

Q. Was there any particular reason that you first quoted from Bates and then from Browning?

A. No.

Mr. Martineau: Do you mean in the series?

Mr. Gertz: Yes, those two items.

513 Mr. Martineau: What you mean is that Eisenschiml quoted first from Bates and then from Browning, and so did Millard.

A. I would say offhand, my reason for that order there was, in writing you build to a climax. The suppression of murder there is a little more powerful than the expression of what is it? Extraordinary documents. So I would naturally put the more emphatical one further on.

Q. Are you through with your answer?

A. Yes.

Q. Will you look at quotes 40 of yours and Eisenschiml?

A. I have.

Q. Did you take any of that language from Eisenschiml?

A. No.

Q. Is there any explanation as to why, in your description of the Surrattsville farm, you used the same items that Eisenschiml used in his description?

Mr. Martineau: I object to that. It doesn't call for it. The items are the items. They are facts in the world. Why should that call for an explanation? Go ahead and
514 answer the question.

A. No.

Q. Will you tell me anything else that you now recall about the Surrattsville tavern, by way of description of it?

Mr. Martineau: You mean descriptions that he has read?

Mr. Gertz: Yes.

A. I believe that it was located on a crossroad, for one thing. The road south ran between the house and the barn. I will look at my own. I can't remember, no.

Mr. Marineau: Have you anything to refresh your memory of it? Do you have pictures of it or anything else around here?

A. They are in that Lincoln Herald that I neglected to bring up, that I have down in Florida.

Mr. Martineau: Have you got it down in Florida?

A. Yes. At least, I am positive I have.

Mr. Martineau: Is that where you told us they took the trip and reconstructed the flight and all that?

515 A. Yes.

Q. Will you look at yours and Eisenschiml's quote 50?

A. I have.

Q. Did you take any of that language from Eisenschiml?

A. No.

Q. Was there any special reason why you quoted the same language from Garrett that Eisenschiml quoted?

A. No.

Q. Will you look at your and Eisenschiml's quote 51?

A. Yes.

Q. Did you take any of that language from Eisenschiml?

A. No.

Q. Is there any particular reason why you quoted the same matter from Baker that Eisenschiml quoted?

A. Yes. We were both trying to prove the same point and that was the only statement that applied to it.

Mr. Martineau: Both quoting historical fact?

A. Yes.

516 Q. Would you look at your quote 52 and Eisenschiml's quote 52?

A. I have.

Q. Did you take any language from the Eisenschiml quote?

A. No.

Q. Will you look at your and Eisenschiml quote 55?

A. I have.

Q. Did you take any of the Eisenschiml's language?

A. No.

Q. Will you look at your and Eisenschiml's quote 56.

A. I have.

Q. Did you take any of the Eisenschiml language?

A. No.

Q. Will you look at your and Eisenschiml quote 57?

A. I have.

Q. Did you take any of the Eisenschiml language?

A. No.

Q. Will you look at your and Eisenschiml's quote 58?

A. I have.

Q. Did you take any of the Eisenschiml language?

A. No.

517 Q. Will you look a your and Eisenschiml's quote 59?

A. I have.

Q. Did you take any of the Eisenschiml language?

A. No.

Q. Will you at your and Eisenschiml's quote 60?

A. I have.

Q. Did you take any of the Eisenschiml language?

A. No.

Mr. Martineau: It looks like Eisenschiml took the Lincoln language there, doesn't it?

Q. From quote 60, did Stanton say anything else at that time and place than what you and Eisenschiml both quoted?

A. Yes, but I don't recall it.

Mr. Martineau: You weren't there, were you?

A. No, I wasn't. I had to stay home that day with a cold.

Mr. Martineau: Neither was Otto.

Q. Look at your and Eisenschiml's quote 62.

A. I have.

518 Q. Did you take any of the Eisenschiml language there?

A. No, sir.

Q. Look at your an Eisenschiml quote 64.

A. I have.

Q. Did you take any of the Eisenschiml language there?

A. No.

Q. Have you found where you got the hour 10:13 P.M.?

A. No. I have had no opportunity whatsoever.

Q. Where you had used the words "The time usually accepted as 10:13"

A. Yes?

Q. Will you state one source for that?

A. Not at the moment. As I said, I have had no opportunity to seek a source. I will stick to my statement.

Q. The only source you could name at this moment is Eisenschiml, is that right?

A. Yes, though that answer doesn't fit in this category. I said "Usually accepted", and I still will stick to that until proven otherwise.

Q. Referring again to quote 17 of both Eisen-
519 schiml and yours, as I recall your direct examination you stated that it was just common sense to refer to —to make reference in the fashion that you and Eisenschiml have to Forbes not being called as a witness?

A. Yes.

Q. Who besides you and Eisenschiml made such reference?

A. I don't know.

Q. Is it not a fact that nobody else besides the two of you made such reference?

A. I would be in no position to answer that. I don't know. I was writing a murder mystery which was to be climaxed by a trial, so I was trying to see the whole thing in the light of incongruities in the mystery itself as well as in the trial which did not get written.

Mr. Martineau: When you said "made such reference" you said "whom besides you and Eisenschiml asked such a question, because it isn't in the form of a question. You understand that?

A. Yes, I do.

Q. Will you turn to quote 27 of yours and Eisenschiml?

520 A. I have it, yes.

Q. You said as I recall, in your direct examination, that you took the figure 17 persons from Eisenschiml?

A. I believe I did, yes.

Q. Did you take anything else in that quote from Eisenschiml?

A. No.

Mr. Martineau: Are we on to form and substance now?

Mr. Gertz: Yes. Language, form, and substance.

Mr. Martineau: In other words, now you have them altogether, language, form, and substance. Do you understand that?

A. Yes, I do.

Q. Now turn to quote 35.

A. I have it.

Q. Will you point out—skip that quote 35. I had covered that. Turn to quote 44.

A. I have it.

Q. As I recall your direct examination you stated that it was just common sense to make the observation there made by you and Eisenschiml?

3521 A. Yes.

Q. Do you know of anyone other than you and Eisenschiml who made that observation?

A. No I don't know of anybody, in that form.

Q. Or in any form?

A. I believe I said that in Sandburg's covering of Stanton's bedside activities that night—not beside, but adjoining room—that part of it was keeping in constant touch with the authorities who were being put on the search. Not in those words, but the same general thought. And I have no doubt that anyone else dealing with the subject has either said or suggested something similar. Had we found out otherwise, it would have been an issue at stake.

Q. Will you turn to quote 49 of yours and Eisenschiml.

A. I have.

Q. As I recall your direct examination you said that those items were simply stating a fact or facing the facts?

A. Yes.

Q. Did anyone else besides you and Eisenschiml face the facts in that way?

522 A. I have no idea. I rather think they did.

Q. Do you know who?

Mr. Martineau: There are several facts in there. Let's make that question a little clearer. There's a reference there to the three soldiers whom Eisenschiml names and Millard does not. Then both of them co[illegible]at on the fact that these people were not prosecuted as conspirators. That's what you mean by that fact, isn't it?

Mr. Gertz: Yes. And in commenting in response to your question on direct Mr. Millard stated that that was simply facing the facts.

Mr. Martineau: That's right. I just want to make sure what the fact that we were both talking about was.

Mr. Gertz: And I am asking if anybody besides Eisenschiml and Mr. Millard faced the facts in that way. Is that clear, Mr. Millard?

A. Yes, that's clear.

Mr. Martineau: Or commented on the fact that these three men or none of them were prosecuted. That's what you mean.

523 Mr. Gertz: What I have been doing is using almost your direct quote, which I think you will admit is permissible because that's the language he used.

A. Well, Ruggles faced it, yes.

Mr. Martineau: Did you say Ruggles faced it?

A. Yes.

Mr. Martineau: Faced what?

A. Faced this fact that he was never punished.

Mr. Martineau: In a writing?

A. Yes.

Q. Will you turn to quotes 52 of yours and Eisenschiml's. You stated, as I recall, on direct examination, that it was just common sense to make that observation.

A. I think that was part of my quote in that case.

Q. Do you know of anyone besides you and Eisenschiml who made such common sense observations on that point?

A. No, I don't, at the moment.

Q. Would you turn to quote 58 of yours and Eisenschiml?

A. I have.

Q. You stated, as I recall, that there were some
524 better sources than you could then recall. Have you since found them?

A. No, I haven't.

Q. So that as of this moment you can't change your original answer on direct examination?

A. I can't change that, no.

Mr. Martineau: Wait a moment. He can't add to his answer. Amplify it would be better.

Mr. Gertz: That's O. K. I want the meaning clear.

Mr. Martineau: Not changing his answer.

Mr. Gertz: That's right.

Q. Quote 60 of yours and Eisenschiml. As I recall, on direct examination you said you were stuck for a moment on that item. Are you still stuck on that item?

A. I am still stuck, yes.

Mr. Martineau: "Then Stanton made his entrance. Lincoln seemed to freeze." He said abruptly "Gentlemen, let us proceed to business." Off the record—

(Discussion off the record.)

Q. Now quote 61.

A. I have it.

525 Q. Will you turn to page 59 of Plaintiff's Exhibit 1. That's it. "Why Was Lincoln Murdered?" Did I say page 59? I mean page 60.

Mr. Martineau: What quote are we on now?

A. Quote 61.

Mr. Gertz: We are on quote 61 and I have asked him also, in connection with that, to turn to page 60 of Plaintiff's Exhibit 1.

Q. Did you see these ads anywhere except on page 60 of the Eisenschiml book?

A. I certainly did.

Q. In what newspaper?

A. In whatever newspaper they appeared in.

Q. What newspaper is that?

A. The Washington Evening Star.

Q. Do those four items appear in the same place in the Washington Evening Star?

A. I don't remember.

Q. Do you recall now on what page of the paper they appeared?

A. No.

Mr. Martineau: How silly can we get?

526 Q. Do you recall the size of that paper by pages?

A. No.

Q. Do you recall it by number of columns per page?

A. No.

Mr. Martineau: Was there a fly speck on it?

Q. Were there any other newspaper advertisements or notices with respect to that?

Mr. Martineau: With respect to the ads?

Mr. Gertz: With respect to the subject matter.

A. Yes. National Republican.

Q. Did you see these ads?

A. I did at the time, yes sir.

Q. Did you see any other ads on that matter?

A. I fail to recall.

Q. Do you have any notices?

A. Not now, no.

Q. What other newspapers were published in Washington at that time?

A. At the moment I can't recall.

Q. Could you recall even one other newspaper that was published in Washington at that time?

527 Mr. Martineau: He just said he couldn't.

Q. I say even one other?

A. The National Intelligencer was one, I believe.

Q. Any other one?

A. I don't recall.

Q. Other than you and Eisenschiml, do you recall anyone else emphasizing that announcement; playing up the presence of Grant rather than Lincoln?

A. Yes. I have a recollection of having seen that in other places, but I can't pin point it at the moment.

Q. Where?

A. I don't believe I have any notes on it at the moment.

Q. Turn to quote 65.

A. It happens I have.

Q. Oh, you have?

A. I have notes here that both Oldroyd and Harris commented on it.

Mr. Martineau: On which?

A. On the importance of Grant's presence over Lincoln's at the theater.

Mr. Martineau: Which is in quote what?

A. Quote 61. Now you want 65?

Q. As I recall your direct examination with respect
528 to 65, you say that observation made by both you and Eisenschiml was glaringly obvious?

A. I would say so, yes.

Q. Do you recall anyone else who made the same observation other than you and Eisenschiml?

A. No, I don't.

Q. Do you recall a telegram from Baker to Eckert dated August 17, 1865, which you used in your article?

A. Yes. Vaguely. I think that referred to his alleged discovery of a plot to free the prisoners from Dry Tortugas.

Q. Where did you get that telegram?

A. I have been trying vainly to recall. I think in Washington somewhere; that these were available in some record, some printed form. I have that feeling.

Q. Is it not a fact that the telegram is not in Baker's book "The History of the Secret Service"?

Mr. Martineau: He didn't say it was.

Mr. Gertz: But I am asking him.

A. No, it's not in Baker's book.

Q. And it's not in the official records?

A. I doubt if it is. I think the official records terminated before that period, but my recollection is that
529 it's in a printed book of that type, though.

Q. But you don't recall?

A. I don't recall.

Mr. Martineau: When you say official records you mean to include War Department records?

Mr. Gertz: No. There is a publication running to many volumes, the short title of which, to all students of the Civil War, is "Official Records."

Mr. Martineau: What I mean is, you didn't mean to include records of the War Department; general records of the War Department?

Mr. Gertz: No. That isn't the exact title. It has a longer title. All students quote it as "Official Records."

Q. Is Carl Sandburg generally regarded as an authority on the Civil War?

A. I would say so.

Q. And on Lincoln?

A. In my opinion, yes.

Q. And Dr. Paul M. Angle is also regarded as an authority on the Civil War and Lincoln?

530 A. In my opinion, yes.

Q. And Dr. James G. Randall?

A. Yes.

Q. Professor Paul H. Buck?

A. I am not too familiar with his work, but I would say so.

Q. Can you name a few others of the outstanding living authorities on the Civil War and Lincoln?

A. Well, Jay Monaghan has done considerable work in the field. If you include the southern side, Douglas Southall Freeman's work.

Mr. Martineau: You mean the Civil War or any important facet thereof?

Mr. Gertz: Yes.

A. Of course, Ralph Newman is in no small measure an authority on it.

Q. Any others that you would name, Mr. Millard?

A. Who is the man that just come out with this "Lincoln And His Generals"?

Q. T. Harry Williams?

A. T. Harry Williams. He has done considerable research and work in the field. This is not his first book on the subject, so I think he is highly regarded. Dr.
531 Bullard, of course. F. Lorriston. I could continue slowly—

Mr. Martineau. He has asked you for it. He wants your list of them, if there are any more of them. You have asked him to give the experts on the Civil War. If he doesn't give them all, he doesn't know what he is talking about.

Mr. Gertz: The top of the experts. The outstanding experts.

Mr. Martineau: You are asking for his expert opinion as to who is an expert. It's a field where the authorities are authorities. They stand almost unchallenged, with a few exceptions.

Mr. Gertz: Actually, there are only a few that are in that category. Isn't that true?

A. I could be nasty and include George Brian, but I wouldn't do that.

Q. Is it not a fact that he is not an expert in that field?

A. I have never seen him recorded as an expert. As a matter of fact, if you want to include experts, you
532 could include Mackinlay Kantor for his "The Long Reed"; and his new book "Andersonville" is, I think, going to the publishers now.

Q. That's enough, unless there is some outstanding one.

A. I probably ignored some of the most outstanding here.

Q. Now you lived, at the time of writing your article, in a town in New Jersey?

A. That's right.

Q. What was the name of that town?

A. Westwood.

Q. How far is that from New York?

A. About 16 miles, I believe.

Q. Are there any library facilities there?

A. Yes. A rather nice small library there.

Q. Not a Civil War library, though?

A. No, but they have some remarkably good books there that they got somehow. They have a librarian who has some interest in that period and she has picked some books that you wouldn't expect to find in a small town library.

Q. During what period of time had you lived in Sarasota?

A. Full time as my home since the period of finish-
533 ing the manuscript under question here, which was when our house was sold and we vacated and moved to Florida. But prior to that time we had been spending nine or ten months of the year down there and keeping our house up here; mostly a storage for my books.

Q. What are the library facilities in Sarasota?

A. They are very good within certain limitations.

Q. Are there any collections of Civil War material there?

A. From the southern side there is some pretty good Civil War material; and Tampa, which I used.—The Tampa library has the best southern material I have located yet.

Q. Any collections of Civil War manuscripts in Sarasota or Tampa?

A. Not that I am aware of. I had finished that search when I was finally settling here.

Q. How much material on the Lincoln assassination is there in Florida?

Mr. Martineau: You mean that he knows about.

Mr. Gertz: So far as he knows.

A. That I know about, probably none. That's what handicapped me in this.

534 Mr. Martineau: Handicapped you in what?

A. In trying to recall, revive my original research here. I had practically nothing to go on except my own books, which were limited.

Mr. Martineau: You mean you are referring to the time after this conspiracy began?

A. After this conspiracy began, yes.

Q. You say in connection with your article, prior to writing it, you went to Washington for some reasons?

A. That's right.

Q. When did you go there?

A. The last trip to Washington—

Q. I mean prior to the publication of the article?

A. Yes. Prior to the publication of the article I think my last trip to Washington was in 1949.

Q. When in 1949?

A. That I have no idea on.

Q. Where in Washington did you go?

A. I divided my time between the Archives and the Library of Congress.

Q. Did you stay at a hotel while you were in Washington?

A. I did, yes.

535 Q. Which hotel?

A. It's a hotel with a double name; hyphenated name—similar to a very famous hotel—it isn't Belton-Stratford—

Q. It isn't Boardman-Park?

A. No, I don't think so. I will tell you where it is. As you come out of the depot there, it's right up the avenue about two blocks, and then a half block to the right. Within about a three block walking range of the depot.

Q. Now when you were at the Archives, with whom there did you consult?

A. A lady, and I don't recall her name. But she is a very helpful lady who is apparently quite an authority herself and was very helpful in anticipating what I might need and making it available.

Q. You don't recall her name, either her first or last name?

A. No, I don't recall her name. I was in there for several days with David Rankin Barbee, whom I suppose I should have included in that list. He and I were working together. And also the State Archivist from Tennessee.

His name is—rather peculiar name. It slipped right
536 at the moment, but the three of us were the only students working in there at the time. We became quite chummy, went to lunch together at noon, exchanged invitations, and talked. I have a standing invitation to come down and work on some material that this man has in Tennessee.

Q. At the Library of Congress, where did you work?

A. As I recall, around the central desk there in back. There is a room or a section back there. As I recall, I went around the desk and on back.

Q. With whom did you consult in the Library of Congress?

A. As I recall, no one. I was working from the files there, and I don't—I may have asked for some help there at one time, but I don't recall from whom. I also, while I was there on one trip—I was combining research on two or three things at once and I had a great deal of help from the Pension Bureau—from a lady up there who found some remarkable stuff for me, but I don't recall her name now.

Q. Remarkable stuff on what subject?

A. That was particularly on Stidger. There were some associated Civil War material which I was using.

Q. Do you recall in your article any material that 537 you got from your Washington trip?

Mr. Martineau: Which one of the articles do you mean?

Mr. Gertz: I thought we agreed that when we refer to your article, we mean the February 1953.

Mr. Martineau: My only thought was, we talked so much about The Devil's Errand Boy this morning—

Mr. Gertz: When I simply say your article, we mean the February 1953 one. If you want to refer to any other article, we will identify that.

Mr. Martineau: Good.

A. Yes. A good deal of material came from there in this manner. I don't know whether I clarified this before, but I think I would like to do it again for the record, if nothing else, that the Lincoln assassination story, the current one that we are discussing here, was an outgrowth of the earlier story, The Devil's Errand Boy. The Devil's

Errand Boy was researched with the idea that the material from that would also be used for the Lincoln piece when it was finally brought out. I knew I was going to
538 write it sooner or later. It was pending, and since the two items dovetailed and interlocked, I performed a great deal of the eventual research on my earliest visit in 1946, examining both the Lafayette Baker and the Lincoln stuff.

Q. Have you finished your answer?

A. Yes.

Q. Where besides Washington did you go for your research?

A. I did considerable in Chicago.

Q. Where?

A. Well, in the Chicago Historical Society. Dr. Angle there.

Q. Did you get any material there which you used in your article?

A. Yes, I did.

Q. What?

A. I can't recall what material, but he had some books that I had not been or thought I would not be able to obtain anywhere else, so I spent some time there on that.

Q. Do you recall which books?

A. No, I don't.

Q. Or any of the books?

539 A. I have a sort of a sneaking notion that the Velasquez book may have been one of them, but I am not sure. But I do know that he had some wonderful material there.

Q. In the form of books?

A. Yes, and also newspapers. They have some wonderful newspaper files which I used.

Q. But no manuscript material?

A. I don't think I referred to any manuscript material.

Q. Besides Washington and Chicago, where did you go for your research?

A. New York.

Q. Where in New York?

A. The Public Library.

Q. Any particular department?

A. Yes. The American history room up there in the days when Vince Vigilante was in charge. He is an outstanding authority on the west.

Q. Anybody else there?

A. Well, there were other people in his department who helped me to some extent, but I was referred to him as a man who had a very lively interest and deep knowledge who would be helpful.

Q. Did you correspond with anybody with respect 540 to material for your article?

A. Yes, to some extent.

Q. With whom?

A. The correspondence came in this way. People who wrote, after reading The Devil's Errand Boy, supplied me with a great deal of personal information.

Q. About what?

A. About the assassination, and characters involved in it.

Q. Did you use any of that material in your article?

A. I may or may not have. I used it, that is, to the extent of reading it and tucking it into my mind as part of the picture. But in direct quotes, no; I am sure I did not.

Q. Could you point out anything in your article based upon that correspondence?

Mr. Martineau: That would necessarily imply before—

A. I may have included some information on Boston Corbett which came out of correspondence with a man who knew Corbett. I also had correspondence with an old gen-

tleman who read law in Finis Bates' law office, but I don't think any actual material. I have quite a little I would
541 use, if the occasion ever arose again, on the period, because it has added somewhat—there was considerable correspondence with a man whose uncle was a preacher at Port Tobacco and he had visited the Garrett farm and knew the people and talked to many eye witnesses to Booth's finish there.

Q. Did you ever correspond with Dr. Eisenschiml?

A. Only on one occasion that I recall. I was lucky enough to fall on some information concerning Sherman that I thought he would like to know, and I wrote it to him and also wrote some questions that had occurred to me on Baker and Sherman, and he wrote a very nice letter thanking me, saying that the material that I had sent him was new to him, telling me that I was—how did he say it—his hope as a researcher or something, because I had the curiosity and the energy to dig for material which was what was badly needed. Very nice letter.

Q. Do you have his letter?

A. I have the letter, yes.

Mr. Martineau: Do you want it?

Mr. Gertz: Yes.

Mr. Martineau: Have you got it?

A. Yes.

542 Mr. Martineau: Give it to him.

(Witnesses handed letter to Mr. Gertz.)

Mr. Gertz: Will you mark this letter for identification as Plaintiff's Exhibit 5, being a letter from Dr. Eisenschiml to Mr. Millard dated July 26, 1946?

(Letter so marked Plaintiff's Exhibit 5 for identification.)

Mr. Martineau: Let the record show that this was voluntarily produced by Mr. Millard at the request of Mr. Gertz.

Q. Is that the only letter that you received from Dr. Eisenschiml?

A. It is the only one I could run across, and to the best of my recollection the only one.

Q. And the paragraph that is encircled in red, that was encircled by you?

A. It was, and I could not recall why. It was for some purpose at the time. I wanted to call someone's attention to it.

Q. Do you have any of your letter or letters, copies of your letter or letters to Eisenschiml?

A. No. I think they must have gone into the same
543 fire with my notes. I was cleaning out my files and things prior to moving. I cleared out a great deal of old correspondence.

Mr. Martineau: Do you have his letter that that Plaintiff's Exhibit 5 was an answer to?

Mr. Gertz: I could dig it up.

Q. You saw Dr. Eisenschiml on only one occasion?

A. I think two. On only one occasion did we get together for a private chat. I have a feeling that I met him on one or more other occasions at the book store.

Q. Do you recall the dates of your meetings with Dr. Eisenschiml?

A. No, I don't. It would be some time prior to the dating of this letter. I might guess three to four weeks prior to this, whatever this date is.

Q. Referring to Plaintiff's Exhibit 5 for identification; that document helps place the date?

A. Yes. It was following that meeting that I then wrote him and got this answer within—I would say within a matter of weeks.

Q. Do you recall at the first meeting you had with Eisenschiml—first of all, who was present besides you
544 and Eisenschiml?

A. His secretary, a gray haired lady back there, librarian or whatever she was called.

Q. Where did that take place?

A. In his library.

Q. Where?

A. On the north side of Chicago close to the lake there. I don't recall the address.

Q. How long were you there on that occasion?

A. Mr. Martineau: You mean in the library?

Q. Or with Dr. Eisenschiml?

A. I would say sometime between two hours, less than two hours or no more than two hours.

Q. Do you recall specifically looking at anything in the library?

A. No, I don't, except to look over the books and be tremendously awed. I was not shown any particular thing because we agreed that what I was looking for he didn't have too much on.

Q. You just browsed through the library?

A. Yes.

Q. You took no notes?

A. No notes.

545 Mr. Martineau: Browsed through the backs, I guess.

Q. And you looked at no manuscripts there?

A. No.

Q. No newspapers?

A. No.

Q. Do you recall any of your conversation with Dr. Eisenschiml on that occasion?

A. Only the very general recollection that I was asking him what he might have on Baker, anything relating to Baker.

Q. And what did he say?

A. He said he had very little. We then discussed

Baker, or the events and incidents around him during that period, and we were both bemoaning the fact that the California end of Baker's life was very much obscured by the California fire, San Francisco fire and earthquake that destroyed early papers and records out there, and he suggested that I look in various places for the information; including, I am positive, this Velasquez book, and I think he pointed or gave me information or tips on source material in other places.

Q. But you don't recall any?

546 A. I don't recollect, no.

Q. That's just about all you recall of the conversation?

A. Yes.

Q. The reference you had to Baker was Lafayette Baker?

A. Yes.

Q. Not Luther Baker, was it?

A. No, not Luther. Lafayette.

Q. Do you recall any other meeting with Dr. Eisenschiml than that one?

A. As I say, I have a vague feeling that we simply met and chatted at the book store on one or more occasions while I was in town. I did considerable browsing in the book store. Ralph Newman is a man who operates almost as a library without regard to whether or not you are buying books. He will bring them out for you and give you that back room that he used to have, that back room table and typewriter.

Q. You mean the Abraham Lincoln book shop?

A. That's right. That's in the days when they were on Michigan Avenue there when he was with Valentine.

Q. But you don't recall anything that was said on 547 any of the other occasions?

A. No.

Q. And you don't recall your telephone conversations, if any, with Dr. Eisenschiml?

A. I don't think I ever had any except the day I was, as I say, I believe I was introduced to him by telephone by Ralph Newman.

Q. Where were you educated?

A. Canby High School, Canby, Minnesota.

Q. Do you have any academic degrees?

A. No, sir, no college at all beyond a night school course at the University of Minnesota, one subject only.

Q. Will you list the articles on the subject of Lincoln and the Civil War that you have published?

Mr. Martineau: Lincoln and the Civil War?

Mr. Gertz: Lincoln and or the Civil War.

A. Well, of course, first was "The Spy Who Saved The Union". Second was "The Devil's Errand Boy". Number three is, of course, "America's Greatest Unsolved Murder". Aside from that, there have been a large number of minor pieces. Now for example, True published a 548 short piece on the plot to burn New York and the oil fields, Pennsylvania oil fields, during the period of the Civil War, with some interlocking of points. I have published quite a few pieces on that and have a book coming out.

Mr. Gertz: Could we get this so I don't have to question at this point—it could be dine at any time in the near future—a list of all of Mr. Millard's published writings on the Civil War and or Lincoln?

Mr. Martineau: Will you prepare that?

A. I could try. I am not even positive that I have very complete records on it.

Mr. Gertz: Do the best you can.

A. Yes.

Q. Are there any unpublished writings of yours on Lincoln and or the Civil War?

A. Well, there is a book which will be out in July which is not specifically on the Civil War, but the characters who moved throughout the war. It's a biography of a fellow who afterwards gained his notoriety in the Pennsylvania oil fields, and in the early days of his career he went through the war as a double spy, one for each side, and as a blockade runner.

549 Q. You don't mean Drake, do you?

A. No. I mean Ben Hogan, the wickedest man in the world. I have worked tentatively, not seriously on it, two novels on the Civil War period which are still in process. I have one unpublished manuscript in here—nobody ever bought the damn thing—short story on Brady, type photographer in the Civil War, taking his—what is it? "Wagon to the Battles".

Q. Did you ever make a comparison between Poore's report of the trial and Pitman's and the original testimony anywhere?

A. Not in the original testimony. In the bound volumes, yes.

Q. In other words, Poore and Pitman you compared, but you didn't compare it with the material in the archives?

A. No. That I didn't see.

Q. When and where did you first get the idea that there was a mystery about Lincoln's death?

A. I think that probably is knowledge that I had when I was just a child. I have never known there was anything but mystery about it. I have taken it for granted that it was a mystery from my earliest recollections.

550 Q. In other words, you can't connect it with any particular book or incident or circumstance?

A. No.

Mr. Martineau: Have you got any newspapers or reports or Congressional investigations or anything that you have been through that show that there was a mystery about it or somebody was asking questions about it?

A. Yes. They asked questions about it twenty four hours after it happened. Everybody in Washington and New York was buzzing for questions on it and those questions, most of them, have never been answered.

Q. When and where did you get the idea that John F. Parker was a key figure in the assassination?

A. From almost the same time, I would say. As we recalled the other night, there was a movie in which his part was played up. They said that was The Birth of a Nation, and I recalled that and I also recalled conversations, discussions, back in my school days, high school days, which I don't recall that he was mentioned by name, but the fact that the man, the murder was made possible by the man outside the box who deserted his post. That seems to have been part of the Lincoln legend.

551 Q. But you don't recall any source for it?

A. No.

Q. When and where did you get the idea that there were premature reports of Lincoln's death in various parts of the country?

A. Simultaneously, I would say, from Dr. Eisenschiml and another book which I mentioned. Now let me see if I could recall it. Here again I am badgered by a feeling that if my memory were better I would be able to recall other sources.

* * * * *

552 A. As I recall now, my attention was first called to that matter of prior publications of the newspapers
553 at the time that I discovered Dr. Eisenschiml's book and was, for that reason and as part of that, also reading and searching in all the available books on the period. I believe I listed here mention of the assassination in History of the Conspiracy as mentioning that—

Mr. Martineau: That's a book, is it?

A. That's a book and it was one of the books I was

reading. Now it would be impossible to say whether that alerted me first, or Dr. Eisenschiml, or to fix it in any way. It was something I was doing within a period of weeks there and only that, and then of course I fell on to the investigation or was guided to the investigation that was conducted into that very question after the war and read, I believe, in the Congressional Globe, additional reports and their failure to prove anything other than that Booth did have a relative in Manchester, New Hampshire and there was also, I think, a man who claimed to have had something to do with it, or they thought he did, and he disappeared and they were never able to find him as a witness.

Q. Are you through with your answer?

A. Yes.

Q. When and where did you first know of the dis-
554 crepancy between Grant's Memoirs and his actual doings?

A. That, I believe, was queued to me by Dr. Eisenschiml's book.

Q. When did you first see the significance of Stanton's refusal to let Eckert act as a bodyguard?

A. I would say the first time I ever discovered that Lincoln had asked for it, and that I can't fix. But that would be, I would think, a normal reaction. It would be a shocking thing for anyone to be told. If I were to stop somebody on the street and say the President of the United States asked for an escort to the theater and was refused, I would think that would shock anyone.

Q. Didn't you get that from Eisenschiml?

A. I don't think so.

Q. Do you know anyone besides you and Eisenschiml who pointed that out?

A. Let me locate this and refresh my recollection.

Mr. Martineau: Are you going round and round again?

You are not going to get home tonight, not the way you are going now. You are going to be here for six months.

This is the second go-around now.

555 Mr. Gertz: No, it isn't.

A. I don't believe that is specifically covered in one of these, but it may be. I don't believe there is a quote in here directly on that point. I would rather not depend on my memory if I have notes to jog it.

Mr. Martineau: Is it mentioned in one of these quotes? The significance, I think, was the question.

A. I believe not.

Mr. Gertz: Ten and eleven.

A. Well, ten and eleven edge around it. I was going to use them first, but they are not directly on it. "Afterwards Stanton swore that Abraham Lincoln had not been to the War Department that day at all." That's as close as we could come. It doesn't deal with his own refusal directly.

Mr. Martineau: What he is interested in now, as I gathered, is who besides you and Eisenschiml, if anybody, pointed out the significance of Stanton's refusal. Is that about it?

Mr. Gertz: It followed the question when did you
556 first see the significance of Stanton's refusal to let Eckert act as a bodyguard.

A. As I say, that was at the moment when I discovered Lincoln had asked for a bodyguard.

Mr. Martineau: You have answered that question.

A. I have answered that.

Mr. Martineau: The question is did anybody else point that out?

A. I am afraid I have no references that would refresh my memory beyond that point.

Mr. Martineau: In other words, you could answer that question if you read all the books on the assassination of Abraham Lincoln?

A. Yes.

Q. What made you examine the false statements of Rathbone and Harris?

A. That was directly Dr. Eisenschiml, as I believe I said before.

Mr. Martineau: Do you remember looking at them in some document?

A. I don't quite understand your question.

557 Mr. Gertz: Looking into matters or making observations with respect to it.

Mr. Martineau: Did you understand that question?

A. Yes, I did.

Q. Where did you get the idea that Booth was apparently being protected?

Mr. Martineau: First of all, let's point out to him in his article where, if ever anywhere, he expresses that idea. Is that in your quotes?

Q. Do you, in your article, express the idea that Booth was being protected apparently?

A. I believe I do. I don't recall it exactly.

Mr. Martineau: Find it. Let's talk about something definite. Is that one of the quotes, Mr. Gertz, to save time?

Mr. Gertz: It is page 115, column 1 of your article, and Eisenschiml exhibit 1, page 91.

Mr. Martineau: Is that covered in the quotes?

Mr. Gertz: I think so.

A. I can't answer your question specifically, but I
558 stated before that it was my understanding that all of my life I have heard the Lincoln assassination treated as a mystery and that the rumor that Booth was not killed, that he escaped, has been common talk and is firmly believed by a great many people, some being responsible, but mostly irresponsible, and has since 1865. The natural inference that I think must have grown out of that—I am not saying

this as a fact—but I can't see it any other way, that the natural inference then was that if he escaped he could only have escaped by the connivance of someone with enough authority to make that possible. So I would say that from the moment that I heard of the Lincoln assassination, when it first began to be talked about in my early days, that that was part of the mystery of it.

Q. Are you through with your answer?

A. Yes.

Q. Will you turn to paragraph 21 of the Eisenschiml affidavit?

A. I have it.

Q. Will you look at sub-paragraphs A to J, both inclusive?

A. I have looked.

559 Q. Do you now recognize any of the statements quoted from you as being historically inaccurate?

A. No, sir. Except one.

Q. Which one?

A. The one there where I inadvertantly typed Stanton instead of Seward over the "Little Bells".

Q. Otherwise you maintain that your statements are accurate, the ones listed in sub-paragraphs A to J, both inclusive?

A. Wait a minute. There are so many completely—fumbling for a word—but you, at any rate you are making me say things here that I did not say.

Q. I don't want to do that. Let's take them up. Just, for example, you take B. "Millard tries to make a mystery of Sergeant Dye's testimony—

A. Now that's a ridiculous statement. I made no mystery of it. I placed him outside as one of the witnesses to the fact that Booth met some men outside the theater. There was no mystery connected with that, intended, or implied. So that's a statement that you are trying to make

me look foolish, to back up a wholly irresponsible statement you made up above there, which I resent God 560 damned hard. You said "In the relatively few instances in the said infringing book", relatively few where I did not infringe, I made historical errors, implying that everything I didn't copy from Eisenschiml was an error.

Q. I am referring now to specific items A to J.

A. Yes, and keep it to those items and don't say "In the instances where I didn't copy from Eisenschiml" if I did. That I did not like.

Mr. Martineau: Let's not have any trick questions here.

Q. I am referring to specific things. I am not referring to any generalizations or anything else.

A. There was a generalization.

Q. I am referring you specifically to sub-paragraph A to J.

A. I will take up the specific things, every one of them.

(A short recess was taken.)

Q. Were there any others?

A. Not that I recognized, no.

Q. Turn to sub-paragraph Y of paragraph 21.

Mr. Martineau: By the way, it's understood, Mr. 561 Goertz, that I have a strenuous objection to this line that you are examining him on.

A. I have it.

Q. Is it not true that all that you could see when you looked through that gimlet hole was the back of Lincoln's chair and part of his head?

A. Well, I don't know, never having looked through that gimlet hole, but I see no reason for thinking so. I see also a great many references to the fact that that was bored for the purpose of enabling him to see all the occupants of the boxes and when they would be looking away from him, so he could open the door and step in. I

have here Harper's Weekly for April 29, 1865 and I would like to quote from the first notice of the Lincoln assassination as it appears here.

Q. Go ahead.

A. "With a gimlet or small bit he had bored a hole in the door panel which he afterward reamed out with his knife so as to leave it a little larger than a buckshot on the inside, while on the other side it was sufficiently large to give his eye a wide range". Now that's the only one that happened to come to me, but I have seen in innumer-
562 able descriptions of that night that his object in reaming the outside of the hole with his knife, which was done, historical fact, was so that from the outside he could place his eye to the hole and see the location of all the occupants of the box before he opened the door.

Mr. Martineau: "He" meaning Booth?

A. Booth. That was the reason for it, and as to my conception of the location and size of the hole, I think it is probably as correct as that of anyone. The size of the hole is pretty well fixed in one way by the fact that it was for a time mistaken for the hole made by the ball from his Derringer pistol.

Q. What was the size of that hole?

A. Just under half an inch in diameter, I believe, is the size given.

Q. Now sub-paragraph D of that paragraph. Do you know anyone who said that the assassin could not possibly have been Booth?

A. I believe that that specific statement is made in a much disliked Brian book "The Great American Myth", but it is my recollection that it was a statement made by him, in many reports of the night, possibly in newspapers. I could not recall any other specific one, but it was a gen-
eral impression gained from reading everything avail-
563 able on the subject that it was almost fifty-fifty as to whether or not the assassin was Booth.

Mr. Martineau: You mean whether or not the people were saying that at the time?

A. Yes.

Q. Now sub-paragraph E. Isn't it a fact that Payne did not know the way to Surrattsville?

A. That I don't know, nor do I know from my reading that it is completely accepted that Payne was to join them at Surrattsville, so I wouldn't know about that. The statement made was that Payne was to be guided to Secretary Seward's house by Harold. That was his part in the plot there; to guide Payne, not to Surrattsville. I have never seen that mentioned before, but to Secretary Seward's house, which is what I questioned since we have testimony that Payne had visited Seward's house every night for more than a week.

Q. So that is your answer?

A. That is my answer.

Q. Now sub-paragraph J. Do you know any place where "The gin-soaked prostitute" was mentioned as being under suspicion in connection with the plot?

A. On the face of it, no. My use of that was for 564 dramatic effect rather than historical accuracy. In that case, though, I might argue that Parker suspected her for some reason of his own. I could quibble with you legally over it. I don't, however, consider it in the category of historical error. You mean you are deliberately going to pass up—

Mr. Martineau: You mean he doesn't want any more.

A. He doesn't want any more.

Mr. Martineau: Have you got something good for him?

A. Just historical argument which really doesn't belong in this at all since either one of us are not on trial as to the degree of authority.

(Discussion off the record.)

Q. Where did you get the idea that the radicals, and Stanton in particular, stood to gain by Lincoln's death?

A. There again that's generally accepted fact. I had understood it to be a generally accepted fact and it was also the subject of a book "Lincoln and the Radicals" and I believe of several other books dealing with that phase of it.

565 Q. But Lincoln and the Radicals is by T. Harry Williams?

A. Oh, is it? Is that the prior book I couldn't think of earlier? That may be, yes.

Q. Did you see in it the acknowledgement to Eisenschiml?

A. I don't recall it, no. As a matter of fact, the argument of the radicals toward Lincoln was the cause of the impeachment of Johnson and was the basis of all the argument and bitter controversy. Innumberable quotations could be found on that score dating from 1865 and before.

Mr. Martineau: Is that in "Myths after Lincoln"? Didn't Lloyd Lewis write that?

Mr. Gertz: Yes.

(Discussion off the record.)

Q. Have you any idea, Mr. Millard, as to the number of magazine articles dealing with the assassination which came out between 1865 and 1939?

A. I wouldn't now, no.

Q. Do you recall how many of them you read?

A. I made an attempt to read all that I could locate.

Q. You have no idea as to how many there were?

566 A. No, I haven't.

Q. You couldn't name outside figures?

Mr. Martineau: He is asking for a guess: fives, tens, hundreds, or thousands. That's what he wants to know.

Mr. Gertz: That's right.

A. I would guess that I probably read somewhere in the neighborhood of ten.

Q. In any of those articles did you read anything giv-

ing the same surmises or conclusions or theories with respect to the assassination that Eisenschiml gives in his books?

Mr. Martineau: I object to that as calling for the most terrific of all conclusions. We don't have the magazine articles here and Eisenschiml's books are a thousand pages long. That's awfully unfair, Mr. Gertz.

Mr. Gertz: Can you answer that?

A. I can't recall specifically. I am under the impression that my answer should have been an unqualified yes right there, but your hesitation or your interruption gave me a chance to think again and I can't pin point it. I would be inclined to say yes. As a matter of fact, I
567 will say yes because the reason for the publication of several of those articles was the existence of the controversy.

Q. Which articles do you refer to?

A. Oh, I refer to Gleason's piece, for example. I wouldn't say Ruggles because I don't think there was any controversy aroused on that. He was merely reminiscing. I believe Crooke lashed back at some things a time or two, if I am not mistaken. There are others of that nature. I think I could say yes on that.

Q. Have you named all of the articles that you recall?

A. All that I recall at the moment.

Q. Are there any others?

A. Yes, there are many others, I am sure.

Q. But you don't recall them?

A. I don't recall them.

Q. Do you have any note with you on them?

A. No.

Q. Do you have any note anywhere on them?

A. Probably not any more.

Mr. Martineau: You mean it went with the other notes

that you described on direct examination and cross-
568 examination?

A. Yes, that would have been part of the original research notes.

Q. Do you recall stating in an affidavit that you filed in response to the Eisenschiml affidavit that all of the statements in your article were "Checked and double checked"?

A. I don't recall those words. It sound like a very familiar phrase to me. May I read this?

Mr. Martineau: I am showing him his affidavit.

A. Yes, you took part of it out of context.

Q. I don't want to take anything out of context. Would you give the full context, Mr. Millard?

A. The full context is "There is not one statement contained in my article which has not been checked and double checked through every available source." If I were writing that I would underscore "every available source" just as a matter of emphasis.

Q. So that "Checked and double checked" is really a figure of speech?

A. In other words, when I said "Checked and double
Checked," I meant that I made an effort to find the
569 source rather than accept a printed statement by someone else and go ahead and use it. I made every possible effort to find the source because at the time I was not, as I said, quite sure what direction my piece was going to take and I hoped to find additional material that might throw me into an entirely different line of reasoning.

Q. Did your checking consist of looking at so-called secondary works rather than primary sources?

A. Not where primary sources were available. I went to primary sources wherever possible. I much perfer to in all cases. I believe I could say without error that the only statements I did accept without being able to at least prove the existence of primary sources were a couple

which I took from Dr. Eisenschiml because I simply wouldn't think of questioning his veracity on any of this matter. But in every other case I am positive that I determined that sources existed even though they might not have been available to me at the moment.

Q. You knew that police records existed, didn't you?

A. Yes, I knew that they existed at one time. Where they are now, I have no idea.

Q. And you made no effort to check the original
370 police records?

A. No.

Q. You simply relied upon Eisenschiml?

A. I did, yes.

Q. You knew the O'Beirne papers existed and that they are primary sources?

A. As a matter of fact, and I don't know how come, but I seemed to have missed the footnote mentioning the O'Beirne papers. Most of the statements which turn out to have been a part of the O'Beirne papers I had placed in my mind as being also available through other sources.

Mr. Gertz: That's all. Thank you.

Redirect Examination by Mr. Martineau.

Q. First let me ask you, Mr. Millard. This array of books dealing in general with the Civil War which you brought here that we have been questioning you about, I think you said on direct that this was approximately ten percent of your entire library on the Civil War period?

A. Yes, ten percent or less.

Q. The others being at your home in Sarasota?

A. No, the bulk of it is in Philadelphia awaiting shipment down there.

371 Q. My question is this: Did you purchase or acquire this library that you have described on the Civil War for the specific purpose of writing either of these

two pieces we have been talking about, the Devil's Errand Boy or America's Greatest Unsolved Murder?

A. Many of them were bought later as additional works after I started writing, but I didn't begin to buy the books with those particular articles in mind, but with the idea of writing in that general period.

Q. In other words, is it fair to say then that your acquisition of the library is a result of our great curiosity and interest in the Civil War period?

A. That's right.

Q. And that the articles came out of it; followed upon the acquisition of such parts of the libary as you had by that time rather than by the other way around?

A. That's right, yes. I have not had large funds to invest and I have made it a policy wherever I could, if some of the basic books were rather expensive and yet available to me in a library somewhere, rather than tie up my fund in that I would pour my funds into what I call background material because I am more interested in revealing the background of the scene rather than in reiterating
572 a fact. That's why I only have few of the so-called basic books on this situation.

Q. You told us about some of the sources you used in connection with this article and there again, Mr. Gertz, the same understanding with you—this article in controversy here, which are not included in your library and which you don't own. Do you remember that?

A. Yes, that's right.

Q. You used that?

A. Yes.

Q. And you did take notes from them, which notes were destroyed at the time and for the reason that you stated on direct examination?

A. Yes.

Q. Now, as to your education, I think Mr. Gertz revealed the fact that you did not have a degree of any sort.

A. That's right, or a college education of any sort.

Q. Isn't it a historical fact that many of the world's greatest writers did not have a college degree?

Mr. Gertz: Let me state for the record, I am not seeking to reflect on Mr. Millard because of lack of education.

573 A. Thank you.

Mr. Gertz: As a matter of fact, in some respects I regard it as an advantage.

(Discussion off the record.)

Q. I think you have stated that you had been writing for twenty-five years altogether and writing exclusively for a living for the last sixteen?

A. Yes, that's as a free-lancer. I was writing exclusively for a living as an advertising man during other portions of that time.

Q. Why didn't you go to college?

A. Lack of funds.

Mr. Gertz: Objection to the question as to form.

Q. When after you got out of high school did you first go to work?

A. Immediately.

Mr. Gertz: Objection to this whole line of questioning.

A. Immediately, I would say. Within a month or so.

Q. What was the nature of the work?

A. I was a clerk in a grocery store.

Q. Then did you get into the advertising business

574 some time thereafter?

A. Yes.

Q. Where? What City?

A. Minneapolis.

Q. What was the general nature of your work when you were in the advertising business?

A. Well, at the time I was advertising manager of two small trade journals, regional trade journals published up there.

Q. How old were you at that time?

A. I would have been about nineteen, I would say.

Q. Did you commence to write on or about that time?

A. During that time I sold my first story, my first article.

Q. And did you do copyrighting in connection with that advertising work?

A. Yes.

Q. And how many years, roughly, were you engaged in that line of work?

A. At that place?

Q. Yes.

A. I would guess roughly about two years.

575 Q. Then did you move from Minneapolis?

A. No, I moved—yes, I moved from Minneapolis to St. Paul to go into an advertising agency.

Q. What type of work did you do there; writing?

A. No. There I was a space buyer.

Q. How long did you stay in that business?

A. I stayed in that until two days after I was married when I was notified I was being laid off. That would make it 1931. That was a wedding present from the office.

Q. Where did you go then?

A. For a time I sold and serviced oil burners and did practically everything to get a dollar in. That was the depression.

Mr. Gertz: This is all very interesting, but this is all over my objection.

Mr. Martineau: Naturally. Go ahead.

A. That was during the period of the depression. So for about six or eight months, shoe shining was probably the only thing I didn't do.

Q. In other words, you didn't do any writing—did you do any writing during that period?

A. I believe I did. I believe I was trying to write at that time a little bit, but not too strenuously.

576 Q. After that first story that you sold in that period when you were nineteen years old, did you sell any stories within the next three or four years?

A. Yes. Right after this brief period of bitterness, I got into another advertising agency in Minneapolis and almost immediately following that I made my first important sale. That was fifty dollars.

Q. In other words, is it fair to say then that all the time you kept writing because of your desire or urge to write?

A. Yes.

Q. Then did you move to Chicago?

A. I moved to Mount Morris, Illinois, first and then to Chicago.

Q. What was the general nature of your work at Mount Morris?

A. Editor of a magazine.

Q. Did you do any writing as editor?

A. Oh, yes. A great deal.

Q. Did you keep selling stories all the time?

A. I sold an occasional one. Most of my writing there was confined to what I had to do for the magazine. I practically wrote the whole magazine along with every-

577 thing else, so it didn't leave too much time for outside writing.

Q. What I mean is, you kept at the profession of writing?

A. Yes, I did.

Q. Then how long did you stay on this job in Mount Morris.

A. We were in Mount Morris nine months and then the magazine was moved to Chicago.

Q. Did you follow?

A. I followed.

Q. How long were you in Chicago?

A. I was in Chicago altogether around six or six and a half years, but the magazine was closed a few months after we got to Chicago and that threw me back on the street again.

Q. What did you do then?

A. Well, then I went into writing in earnest and also opened a little advertising and public relations office of my own there.

Q. And you kept on writing, did you?

A. Yes.

Q. Writing stories and copy for advertising and 578 all that sort of thing?

A. Yes, mostly trade articles. I had done no fiction at that time with the exception of one piece, but those were trade journal articles and advertising copy.

Q. And did you pursue the profession of writing?

A. Yes.

Q. How many years, roughly, did that continue?

A. That continued for, I believe, probably about five years.

Q. In Chicago?

A. Yes.

Q. Then what happened?

A. Then I made this plunge into free lance writing, moved to New York, and have been a full time free lancer ever since.

Q. What year would that be just so we can drop that subject, that you came to New York?

A. I have estimated it vaguely at about sixteen years ago, which would put it back in about 1936.

Q. So that we can leave the subject, it is your recollection then that from 1936 on up to and including the present you have been a free lance professional writer?

579 A. Yes.

Q. How many stories would you estimate that you have sold during your entire career as a writer?

A. I couldn't even make a wild guess at that.

Q. Is it tens, hundreds, or thousands?

A. I would say thousands—no, that's a little exaggerated. I would say at least a thousand.

Q. You are a married man?

A. I am.

Q. Do you have any children?

A. I have one boy, yes.

Q. Do you have any stories that are published right now?

A. Yes.

Q. What magazine?

A. Blue Book magazine just on the news stand probably yesterday for the first time.

Q. How many stories do you have in the that magazine?

A. Two.

Q. Two?

A. Two.

Q. Is that unusual in the writing profession?

A. Yes, that's decidedly unusual.

580 Mr. Gertz: Are they both under your name?

A. Yes, imagine that, in the same issue.

Mr. Gertz: We will stipulate that that's unusual.

Q. While Mr. Gertz was examining you he had asked you one question which he later withdrew and which question I can't say now because I don't recall, and you were looking through some of your books and you said "You almost gave me a chance to help myself". Then you pro-

ceeded to make a note and another question was asked you. Have you got that note?

A. Yes.

Mr. Gertz: I will object to that question as to form. Go ahead because I am curious too.

A. I have found it, yes.

Q. There was something that you wanted to say in respect of that note you made while Mr. Gertz was questioning you and which question he withdrew.

A. Yes.

Q. Will you tell us what it is?

A. The thing in my mind, the inference, of course, 581 behind this whole trial is that I have done nothing but plagarize from the plaintiff, I believe that's the term, in writing my articles. I just ran across a neat little piece of evidence in my favor here. In the story The Devil's Errand Boy page 76, column 2 and paragraph 2, I am quoting from Lafayette Bake, and here is the pertinent part "He asked where he was captured". I said 'near Port Conway' beyond the Rappahannock in Virginia". I just got a sneaking hunch, and as near as I can determine in neither of Dr. Eisenschiml's books does he include that portion of the remark, and I remember that I got that right out of the Congressional record, so I just wanted to throw that in. I wanted to show that I searched a source other than Eisenschiml or I couldn't have completed a quote, to the best of my knowledge, as incomplete in either of his books.

Mr. Gertz: I am moving to strike the answer.

A. It's clear proof that I got it from someone besides him.

Q. Mr. Gertz examined you at some length on Dr. Eisenschiml's affidavit. Do you recall that?

A. Yes.

582 Q. He asked you first concerning paragraph 20, those sub-paragraphs A down to O inclusive. Do you recall that?

A. I do.

Q. I think I am stating it fairly when I say that my memory of it is that he asked you which of those items from A to O inclusive, paragraph 20, were items which you considered to be Dr. Eisenschiml's discoveries to which you referred in your article on the Devil's Errand Boy.

Mr. Gertz: Article of July 1947?

Mr. Martineau: Yes, July 1947.

Q. My notes are incomplete as to which of those items A to O you listed there as such alleged discoveries by Dr. Eisenschiml. Will you just give them to me again?

A. I will try. I will have to use my memory here too. I am sure I picked item G, item I, item J, item L, and as I remember, those were the only ones that I picked. I may be wrong, but I think those are the ones. They are the ones that I would look at and pick today.

Q. Now in answering as you did answer Mr. Gertz and as you answer these questions now, did you imply or mean that you regarded those ideas as the property
583 of Dr. Eisenschiml?

A. I don't want to get into a legal explanation of "property". I feel that they originated with him so far as I know.

Q. In other words you feel that Dr. Eisenschiml was the first person who ever called attention to those historical facts?

A. He was the first person, to my knowledge, the first person who ever called my attention to them.

Q. As far as you know. That's what I mean.

A. Yes.

Q. That's what you meant?

A. Yes.

Q. But you did not mean by your answer, I take it, that you felt that if you were to make use of any of such ideas that you would be poaching upon Dr. Eisenschiml's preserve, so to speak?

A. No, as a matter of fact I feel quite the opposite, because my understanding has always been that Dr. Eisenschiml wrote his books for the express purpose of arousing curiosity, not satisfying it or stifling it. Therefore he wanted other people to feel that way, to have that same curiosity and to spread his own questioning.

584 Q. See if I understand this. In other words, your feeling was that Dr. Eisenschiml, having had first as a historian posed the problem and aroused the curiosity, you felt that it was your duty as a scholar or flattering to Dr. Eisenschiml to go forward with the problem?

Mr. Gertz: Objection.

A. I felt not perhaps that it was my duty but I felt that he was hoping that such would occur in the case of every reader.

Q. Would you turn to paragraph 19 of the Eisenschiml affidavit where Mr. Gertz called your attention to subparagraphs A to II, both inclusive?

A. Yes.

Q. I think there in the same category you listed as matters which you regarded as first having been brought to light or called attention to by Dr. Eisenschiml, the matters in paragraphs G, H, I, N, T, U, V, X, GG, and HH. Will you run over that again and see if I have my list correct?

A. I believe that accounts for it. There are, of course, some little verbal traps in these items—

Q. I want to go over those items.

A. —that could be argued.

585 Q. I want to go over these items with you right now. In other words, the Eisenschiml affidavit says that these items which you have just listed are a summary of new factual material presented for the first time in plaintiff's two said copyrighted books, all of which was copied, plagarized, infringed and pirated by the defendant. I take it you don't agree with that characterization?

A. I disagree very strongly.

Q. Now let us examine very briefly item G. Item G "Is the curious fact of Grant's evasiveness in his memoirs". Did you want to leave the impression that Dr. Eisenschiml was the first historical scholar to call attention to this fact of Grant's alleged evasiveness as shown by Grant's memoirs?

A. Well, I could only say that he was the first to call it to my attention.

Q. He is the first scholar whose work you ever saw to that effect?

A. Yes.

Q. Now did you use that in your work? Did you call attention to that fact also?

A. Yes, I did.

586 Q. And in dong so did you feel that you were poaching on the preserves of Dr. Otto Eisenschiml?

A. No.

* * * * *

587 Q. Now take up sub-paragraph H. "Proof that Grant's excuse for leaving Washington was unfounded".

A. Yes.

Q. What was that proof that you had reference to or understood by your answer to that question?

A. My attention was called to Grant's own statements that his work was cleaned up a day prior, or pretty well cleaned up a day prior to his leaving, which did not coin-

cide with his statement made in another place that he had been held up by the pressure of work.

Q. In other words, let me see if I understand this situation. Did you understand item H to be a statement by Dr. Eisenschiml that he was the first one who had proved that Grant's excuse was unfounded?

A. He was the first to call my attention to it.

Q. I believe you mentioned on cross-examination something, or you quoted some authority to the effect that Mrs. Grant had some fear of being insulted publicly by Mrs. Lincoln?

A. Yes.

Q. In your opinion as a writer would that have
588 been an excuse for a husband not to go to the party, or the theater party, because his wife told him she thought she would be insulted by the hostess?

Mr. Gertz: Objection.

A. I think that would be part of it. I think deeper than that would be his own position in the matter; Grant's own position in the matter of having to either defend his wife against his commander-in-chief's wife or stand by and be made to look like an ass while his wife is insulted. I think that might have entered into his feelings in the matter too.

Q. Then when he got home, defending himself against his wife?

A. Right.

Mr. Gertz: I move the question and answer be stricken. Objected to.

Mr. Martineau: That's understood.

Mr. Gertz: These are formal, not merely substance.

Mr. Martineau: You think I am leading him?

Mr. Gertz: And other formal defects in the questions.

If the questions are defective, then the answer cer-
589 tainly is strikable.

Q. Did Grant have an excuse for leaving Washington, as a matter of history?

A. His excuse was merely wanting to see his children. That is the recorded historical excuse.

Q. Now go to item I. That's the time table of the Camden and Amboy Railway. That's what that refers to, doesn't it?

A. Yes.

Q. Now you stated on direct examination that the first person who ever actually reproduced or discovered the actual time table was Dr. Eisenschiml?

A. The first one I saw, yes.

Q. That's the first time you ever saw the actual times of the second train?

A. Yes. I had, however, made a minor attempt to find it myself and then contented myself with a later edition.

Q. Was that Hassan's book that you identified?

A. Yes.

Q. In your article, in telling about the times of these trains, did you feel that you were stating a historical fact or stealing something from Dr. Otto Eisenschiml?

590 Mr. Gertz: Objection.

A. Stating a historical fact.

Q. You didn't feel, I take it, that Dr. Eisenschiml was the only person in the world who had the right to say that that train left at 2:58 in the afternoon?

A. No, I felt that Dr. Eisenschiml had no control over that at all.

Q. When you read Dr. Eisenschiml's book—this is a general question—and saw what he held forth as historical facts, did you get the impression anywhere from any of Dr. Eisenschiml's works that he did not wish to have any other scholars report the same historical facts?

A. No, I got quite the opposite impression. It has also been so stated to me by mutual friends.

Mr. Gertz: I move the answer be stricken.

Q. Will you come to item I. Go quickly to Paragraph X.

Let me see if I understand that. I will quote it. "The contradictory and evasive statements of Major Rathbone and Miss Harris". Do you see that, Mr. Millard?

A. Yes.

Q. Do I understand, then, that your testimony was that Dr. Eisenschiml was the first historical scholar
591 who called attention to the fact that Major Rathbone and Miss Harris had made one statement on one occasion and another statement on another occasion, both of which contradicted each other?

A. That was the first I had ever been aware of that.

Q. When you read that statement in Dr. Eisenschiml's works, did you take that to be a statement by him of historical facts?

A. Yes.

Q. Will you turn to sub-paragraph T "The willful changes made in the official records of the trial, made by Pitman and Judge Advocate Burnett". Do you see that?

A. I see it.

Q. You say that Dr. Eisenschiml, as far as you know, is the first historian who called attention to those changes?

A. There is one word in there that is important. "Willful" changes. I think including the word "willful" in there I would say yes. I was either at the same time, or, within a very short time, aware of differences myself which I stumbled on either just before or just after reading Eisenschiml. Perhaps I just read it and their sig-
nificance meant more to me afterward; but at least I
592 did discover differences through using both Pitman and Poore. Their arrangement of matter was a little different. I turned to Poore to try to clarify some chronological headaches I was having and discovered that one testimony ended much more quickly than the other.

Q. Let me see if I can get the fact on this then. Let's see if I can understand it. You read in Dr. Eisenschiml's

book that, first of all, changes had been made by Pitman and the Judge Advocate Burnett, right?

A. Right.

Q. In the official record of the trial?

A. Yes.

Q. Right?

A. Yes.

Q. Dr. Eisenschiml says that in his book?

A. Yes.

Q. Did you see Dr. Eisenschiml say that the changes were willful—and I underline willful—if you remember?

A. He implies it very strongly if he doesn't say it outright.

Q. Did Dr. Eisenschiml cite the authority for his statement? I presume he did.

593 A. He did, yes.

Q. And he cited, I suppose, the official records?

A. He cited the original manuscript in the archives.

Q. The original manuscript of Pitman's records?

A. Yes.

Q. And he also cited Pitman's printed book, didn't he?

A. Yes.

Q. Did you examine Pitman's printed book?

A. Yes. I own that. I have that.

Q. Where?

Mr. Gertz: You didn't, however, look at the actual manuscript?

A. No, I didn't.

Q. Where is the actual manuscript of Pitman?

A. In the archives of the War Department.

Q. Did you try to get at it?

A. No.

Q. You took Dr. Eisenschiml's word for it?

A. I did on that, yes.

Q. When you read that in Dr. Eisenschiml's book, did

you regard that as a statement of historical fact by a reliable historian?

594 A. I did. Documented by an actual photograph.

Q. This original Pitman record, that was in longhand, as you understood it?

A. It was in shorthand and then translated in longhand for the use of people. There were no typewriters available in those days, so he transcribed his notes in longhand.

Q. Where do you understand the original shorthand notes to be and any original longhand notes of Pitman?

A. They were in a box of items—I think they are in a box of items relating to the trial and they are in the War Department archives.

Q. Have you physically seen them?

A. No, I have not.

Q. Are they available to the public?

A. Oh, yes. That is, they are available to the public who can answer the proper questions and get one of these search cards.

Mr. Gertz: Since July 1953.

A. Weren't they available before?

Mr. Gertz: No. You had to get special permission.

Q. Look at sub-paragraph U "The fact that the
595 pursuit of Booth was not undertaken in the right direction and that the War Department neglected to follow Booth's trail after Fletcher's report". Let me see if I understand that. Is it your statement that Dr. Eisenschiml was the first historian who called attention to the historical facts stated in that sub-paragraph?

A. This is a case now where I say that there is a verbal trap there. There are two questions that do not call for the same answer. The first part "The fact that the pursuit of Booth was not undertaken in the right direction * * *" is one question to which the answer is, from my standpoint,

yes, Dr. Eisenschiml is the first one to call that to my attention. The latter part of it is, however—

Q. The second part of the sentence is "* * * that the War Department neglected to follow Booth's trail after Fletcher's report".

A. Yes, that has been subject to curiosity by historians for a great many years. It has been brought out in books, I am sure, or magazine articles on the field, so that is not an original—

Q. So as to the second part of it, you say that Dr. Eisenschiml is not the first scholar to call that to the
596 attention of the world?

A. No, by no means. The greater implication to the first one, I would say he is.

Q. Let's take the first part of it then as you have read it "The fact that the pursuit of Booth was not undertaken in the right direction". When you read that in Dr. Eisenschiml's book, did you understand him to be stating a fact of history?

A. Yes.

Q. Or a fact of history plus his opinion or inference drawn?

A. Yes, it was his inference on facts already known and generally available to anyone.

Q. In other words, do I oversimplify it when I say that the historical fact was that Booth went south and the chase went north?

A. That's reasonably correct.

Q. And Dr. Eisenschiml was the first person to say "This is not chasing him in the right direction". Is that oversimplifying it?

A. Yes. It makes it sound much simpler because the records are so dammably mixed up and there was such a mass of orders and counterorders going out at that
597 time that it takes a very shrewd mind to cut through

that maze and arrive at the obvious conclusion that, well, it's an obvious conclusion if you can see it, let's say.

Q. I see. In other words, then, to give full credit to Dr. Eisenschiml, he had the shrewd and analytical mind to penetrate that maze of orders and counterorders and countermanded orders and everybody galloping off in all directions at once and point out that which I oversimplified?

A. Yes.

Q. And when you read that in his book, read his analysis of that, did you understand him to be stating a historical fact plus his excellent inference drawn therefrom?

A. I did.

Q. And did you understand that you, as another historical scholar, would be permitted to utilize not his language but historical fact which he thus stated?

A. I would say that every scholar would be forced to use it or write what is now known to be an untrue piece of history.

Q. Would you look at item V "The fact that the blotter of the Tenth Street police station in Washington con-
598 tained the names of witnesses and their statements.". Have you ever seen the blotter?

A. No, I haven't.

Q. I don't recall, but in the book does Dr. Eisenschiml set forth the facsimile of the blotter or does he make statements about what the blotter contains?

A. I don't recall exactly on that. There again that question, or that item, is a little ambiguous.

Q. Let's straighten it out if we can.

A. It implies, without, I think, meaning to, that no one knew prior to Dr. Eisenschiml that the blotter contained the names of witnesses and their statements. I think that was generally known by practically everyone.

Q. But no one before Eisenschiml had taken the trouble to look at the blotter?

A. That's what I want to say. The existence of the names on the blotter is no mystery nor has it ever been.

Q. Let's see if we analyze it correctly. The policeman who put the entries on the blotter must have been a person who knew about it?

A. Yes. Right in Pitman, witness after witness says he went to the Metropolitan Police Station and made statements, so there is no mystery about that. That's a known fact.

599 Q. But what I want to get is the part you say Eisenschiml is the first person to discover or call attention to. Is this your statement then, that he was the first scholar to call attention to the fact that this information could be had by looking at that blotter?

A. He was the first one I know of to look at it. Let's put it that way.

Q. And when you saw that in his book did you understand the results which he stated ensued from looking at that blotter to be a statement by him, a noted scholar, of a historical fact.

A. Yes. Consisting of the number seventeen, as I recall.

Q. Will you turn to sub-paragraph K "Stanton's delay in broadcasting Booth's name until too late to reach the morning editions". Now you say that Dr. Eisenschiml, as far as you know, was the first scholar to put that historical fact before the world?

A. No, the first one to put an interpretation on it. The fact was known.

Q. Let's see if we can get this now. What facts were known as far as you know? What historical facts?

A. The timing of the notes as they went out from 600 the War Department was a matter of public record.

Q. In other words, we know when Lincoln was shot, within reasonable variations?

A. Yes.

Q. Some time around ten o'clock on Friday night, April 14, 1865? That's a fact that everybody knows?

A. Yes.

Q. Second, we know when the wires went out?

A. We have access to the records on that which have never been—

Q. Are those two facts, as far as we have gone, have those been widely published before Dr. Eisenschiml?

A. I would not say widely published, no.

Q. Well, published?

A. Published, yes.

Q. We know when the morning editions would come out, the morning papers?

A. Yes.

Q. That's a historical fact, isn't it?

A. Yes.

Q. What I want to know is, what do you say Dr. Eisenschiml was the first person to call the world's attention to in that?

601 A. He was the first person, in my opinion, the first person to lay the delay to intent rather than confusion.

Q. I see. In other words—

A. I think almost everyone seeing that just takes it for granted that there was such a terrific turmoil and upset on everyone's part that these delays were the result of everyone running around madly and getting nowhere.

Q. And Dr. Eisenschiml was the first person to say that there was, shall we say, method to the alleged seeming madness, is that it?

A. Yes.

Q. In other words, Dr. Eisenschiml was the first person to draw that inference from these historical facts which you have just detailed?

A. Yes.

Q. Now when you read that statement of Dr. Eisen-

schiml's in his books, did you understand the facts plus his inference to constitute one historical fact or statement of historical fact? In other words, what I am getting at is, did you understand that the opinion or inference drawn by some noted—a scholar as Dr. Eisenschiml—would, in it's turn, be entitled to the dignity of a historical fact?

602 A. Yes, it would become a historical fact.

Mr. Gertz: Objection.

Q. Will you turn to sub-paragraph GG "That the 'tobacco barn' in Garrett's farm had more than one door". Let me see if I understand you here. Is it your statement that Dr. Eisenschiml was the first scholar to call attention to the fact that there is more than one door in that barn?

A. No. In this case he was the first to call it to my attention. The statements antedate Eisenschiml statements to that effect. It was known many years before Eisenschiml wrote his books.

Q. As I recall it, in the quote we went over covering that, I forget which one it is now, Dr. Eisenschiml quotes some newspaper, doesn't he, to find it there? It's quote number fifty. Dr. Eisenschiml quotes William Garrett quoting in the Confederate Veteran in April 1921. He confirms the testimony of the Reverend Richard Garrett who says that there were double doors on all four sides. Let me see if I understand this. Is it your understanding that the record of the trial contains testimony by the Reverend Richard Garrett to the effect that this barn had double doors on all four sides?

603 A. No, this was not testimony of the trial. It was thrown in, I believe, gratuitously, in a reminiscence story, as I remember.

Q. I see. Yes, that's right. Dr. Eisenschiml says, according to this testimony there was only one door. Then he goes on and says the Reverend Richard B. Garrett says that double doors were on all four sides.

A. Yes.

Q. Do you remember where you have heard that Reverend Garrett said that there were two doors on all four sides except in Eisenschiml?

A. Well, I read the piece under discussion. Whether or not—

Q. When you say the piece under discussion, what do you mean?

A. The Confederate Veteran story.

Q. You saw the Confederate Veteran story?

A. Yes.

Q. When did you see that?

A. That's something I don't recall. I was trying to think whether I was persuaded to read it by having found out what was in there through Dr. Eisenschiml's books or whether I came upon it myself in running down
604 everything pertaining to the subject that I was trying to do.

Q. Is it your recollection that you saw this issue of the Confederate Veteran for April 1921 in your research in Washington which you described?

A. I rather think so. Either in Washington or Chicago. It may have been in Chicago.

Q. Let's get this straight. Did you actually see the newspaper or magazine or whatever it is, the Confederate Veteran?

A. Yes.

Q. And did that newspaper, according to your recollection, say that this barn had two double doors on all four sides?

A. Yes.

Q. In other words is it possible, then, or probable, that your curiosity or your being alerted to that fact came from reading Dr. Eisenschiml's book?

A. Yes. It is quite possible.

Q. And then being alerted to it, you then went back to the source, the Confederate Veteran, and there saw the confirmation of the fact that Dr. Eisenschiml had stated?

A. My curiosity had been aroused. However—

Q. Is that right?

605 A. Yes. —had been aroused by other earlier testimony that comes within an ace of saying that there were other doors.

Q. Is that the testimony to which you referred on direct examination when we covered this quote 50?

A. Baker testimony, I believe. The Baker statement is what I referred to there.

Q. In other words, I don't want to testify myself, but my memory of it was that—

A. The front door of the barn.

Q. The testimony simply said something like this—I think you referred to Baker, page 498, and you quoted him there saying "The front door facing the west gable". Right?

A. That's right, yes.

Q. Then I think you quoted another part of Baker which quoted a letter from Conger and Lieutenant Baker which referred to only one open door of the barn?

A. Yes.

Q. I think you also referred to "Dougherty speaking only of the door of the barn which was padlocked".

A. Yes.

Q. So in other words, to get the thing straightened

606 out, those merely indicated to you that there were more than one door, whether two, three, four, five, or any other number?

A. That there might have been.

Q. Unstated, but it merely alerted you to the fact that there was more than one door. The statement as to the exact number of doors was made by Dr. Eisenschiml earlier

in his book and later confirmed by you in seeing the original source in the Confederate Veteran?

A. Probably in that order, yes. Incidentally, appropo of an earlier statement, you said Canadian instead of Confederate. You know that the Confederate plotters in Canada, when they came down to this country, called themselves Canadians. It was a kind of code name for them.

Q. The last sub-paragraph of this category was sub-paragraph HH. Do you see that? "Lafayette C. Baker's determination to catch Booth, or substitute another body for it". Do you see that?

A. Yes.

Q. Is it your statement that Dr. Eisenschiml was the first person to call that to the attention of the historical world, that Baker was going to substitute a body for Booth if he couldn't catch Booth?

607 A. No. The first to call it to my attention. The statement was in existence since 1865.

Q. In other words, see if this doesn't state it fairly. You first read this statement to this effect in Dr. Eisenschiml's book?

A. Yes.

Q. He quoted this Velasquez book, right?

A. Yes.

Q. You had never heard about this rather amazing fact until you read it in Eisenschiml?

A. It's probably right. He told me about the book. I read the book. Now whether I had read that before his or just after, it came from him anyhow, either through his book or verbally.

Q. In any case, in order of time, first Eisenschiml said it to you either in the book or verbally?

A. Yes.

Q. In his authority he gave this book by Mrs. Velasquez?

A. Yes.

Q. You then read the book by Velasquez?

A. Yes.

Q. And there saw this quotation by her from 608 Lafayette Baker?

A. Yes, which incidentally is a big book. I remember that much.

Q. But Dr. Eisenschiml either told you that or he read it in his book?

A. Yes.

Q. You understood, did you not, that he was giving a true and correct quotation of a historical fact or a statement, an important statement by this Baker, is that right?

A. That's right.

Q. I think you have explained why you italicized, as you did, Dr. Eisenschiml italicized the words "I intended to have his body dead or alive or a mighty good substitute for it". End of italics. You only italicized from that quote the phrase "or a mighty good substitute for it". As I understand it, in the original Velasquez book, nothing is italicized?

A. So it is stated. I cannot recall from my own knowledge. I have only the word of Eisenschiml and Mr. Gertz on that, but I am willing to accept it. I am sure it is true.

Q. In other words, you italicized the part that you 609 thought was the big impact or thrust of the sentence, the startling fact that this fellow Baker was planning to run in a ringer body, you might say?

A. Yes.

Q. Let me see if I state this fairly. In all these matters which I have been questioning you about and which Mr. Gertz questioned you about at some length that you say were Dr. Eisenschiml's discoveries, what you meant was, I take it, that he was the first scholar to call it to your attention?

A. That is a fact.

Q. And then, whatever your testimony is and where you could, you either verified it or else took his word for it?

A. Yes.

Q. But you did not copy his language?

A. That's right.

Q. Now as to this famous Velasquez book, I think Mr. Gertz was asking you about that last night after you had been on the witness stand approximately seven and a half hours. Do you recall that?

A. Yes. I know it was late on that day.

Mr. Gertz: And you took no exception to being 610 on the stand that long?

A. No, not at all.

Mr. Gertz: I just want the record to be clear, since the point is raised, that I didn't insist upon prolonging his examination.

Mr. Martineau: You are right. We are all in good faith trying to get through.

Q. The fact is that you had been on the stand for many, many hours. What was your physical condition at that time?

A. Pretty tired.

Q. I suppose Mr. Gertz was too?

A. I imagine.

Q. He asked you, you recall, how big the Velasquez book was, how many pages there were in it, what were some of the chapter headings, and what were the contents of the book. I think that all you recalled at that time was that it dealt with her activities as a secret agent for the Confederate Government and her travels back and forth between Washington, or something like that?

A. I wasn't even too sure on that, nor am I yet.

Q. When was the last time you saw this Velasquez book?

611 A. In either 1945 or 1946.

Q. When you came up here on this last trip, did you have occasion to look at Velasquez' book?

A. No, I didn't.

Q. And since your examination began on last Thursday at two o'clock, have you had time to get down to the New York library or any other library, wherever this book is, and look at it?

A. No, I haven't.

Q. And before testifying in this case you knew there was some kind of a controversy and Dr. Eisenschiml was making charges that there was a rare book to which you wouldn't have access, right?

A. Right.

Q. And he was making—you knew that he was making a big point about that in his affidavit?

A. Yes.

Q. Now having read that in his affidavit and knowing that you were going to testify, did you take the trouble to go and examine the book to answer questions so that you could tell exactly what the chapter headings were and all that sort of thing?

A. No, I did not. I had determined at the beginning,
612 back in 1945 or 6, that the book was available in New York in case I got an O.K. on my idea to write a story about it. When that was not given, I just dropped the whole subject.

Q. I think you said this morning that when you came up here getting reading to testify in this case, you used the Eisenschiml affidavit to reorient yourself?

A. Yes.

Q. Do you recall using that phrase?

A. Yes, I do.

Q. Will you explain just exactly what you meant? Were you getting ready to testify?

A. Yes.

Q. And did you mean that what you wanted to do was to see what Eisenschiml was claiming?

A. Yes.

Q. Where the various sixty-six different items of alleged piracy by you and you wanted to see what he has claimed, so you could see what your answer was? Is that what you meant?

A. Yes. I could explain further, that in order to answer fluently on this I would have had to push back into my mind that whole mass of detail and reading that I did
613 when I did the manuscript originally and which I had afterward wiped out of my mind to make room for other researches. I didn't want to go to that trouble and time. I couldn't afford it. I had my own work to do, so I short-cut it by taking only the points that I felt were going to be argued upon and trying to refresh my memory upon those. I may not have even, this second time, used the same sources that I did originally. That I can't remember.

Q. In other words, is this a fair statement, that when you came on here, the attorneys said to you that they wanted you to testify and served you with a subpoena?

A. Yes.

Q. And then they called to your attention the Eisenschiml affidavit, or at least the sixty-six items in controversy, and suggested that you get your testimony ready about those sixty-six different items?

A. Yes.

Q. Is that it?

A. That's right.

Q. Rather than every jot and title of your article or articles and every line in Dr. Eisenschiml's two books?

614 A. Yes.

Q. So that when you were to answer questions either on direct or cross examination, instead of having

to paw through this whole library to answer every question, you would have some general idea of where you were heading?

A. Yes, that's right.

Q. Now these cards. Mr. Gertz asked about them. I think you told how you prepared them. They were also done in connection with just being able to testify more rapidly or quickly and efficiently in regard to these sixty-six items of controversy?

A. Yes.

Mr. Gertz: There are sixty-six cards in other words?

A. Yes, plus a few which I made additionally.

Mr. Martineau: As a matter of fact, 6, because there is a 34A in here.

Q. I think you told about how you just put your references on those cards and the historical authorities for the statements made by you in your artical, the disputed statements in Exhibit C, so that you could quickly answer questions as to what the authorities were?

A. Yes. I didn't even make an attempt to complete, 615 any of these researches. I figured if I found one or two authorities on which I could rely, that I had sufficient. I didn't attempt to pursue the subject to it's ultimate, confining everything that I might have had originally on it.

Q. Now let's see. I think you said this morning that on those cards you put some material that was not source material for your article? Did I get that correct?

A. Yes, I think I did.

Q. Is this the situation, that on those cards—see if it states it fairly in general—you have first material which was source material you used in your article in respect particularly to these sixty-six disputed items and, secondly, some additional material which doesn't directly pertain to the items?

A. Well, it directly pertains to the items, but was not necessarily original source material.

617 Q. Are you able to pick out the stuff on these cards that was not used by you as source material? Are 618 you able to pick out of this pack of cards of yours the material which wasn't used as source material in writing the article?

A. I may or may not. That was only a feeling. I do a great deal on—I guess you might call hunches in my mind or just a feeling about something that I don't bother to authenticate. I am just sure that a certain thing goes so and just pass it that way. I referred to this Philadelphia Inquirer transcript which I didn't actually use here except as additional material, but that I did not have originally. I didn't know it existed. I had Poore and Pitman, but I didn't have that one.

Q. You mean you didn't have the Philadelphia Inquirer transcript when you wrote the article?

A. When I wrote the original article.

Mr. Gertz: And you didn't have it in mind either?

A. No, I didn't know it existed. I found that quite by accident the other day. I included it, but it was only an additional source. Here is one I am not sure on. I don't recall that this Private Miles O'Reilly book was used on the original article. I am not sure on that. Most of these I guess I did. If I didn't use them in the 619 sense of taking notes, at least I went through them.

Q. You mean in preparing to write your article?

A. Yes, in preparing to write the article, because I read everything I could lay my hands on on the subject. Where there was a duplication of material, eventually I would take my final notes from the most easily available source. I do not see anything here that I could say defi-

nitely other than that, even definitely on that, but I think that's true.

Q. If you had not prepared those cards in giving your testimony, how much longer would this testimony have taken if you had to go to—

A. There would have been no testimony. I would have had to run to the library for every question asked me.

Q. Mr. Gertz was asking you as to your method of writing, do you remember?

A. Yes.

Q. And I think you told him generally, well, what you said on direct examination too, that you would read all these books and absorb them—

A. And digest them.

Q. And digest them and so forth, and I think you said that in many instances you didn't make notes. And
6290 what I want to ask you is this. When you would read through all these books in preparing to write this piece you would remember the historical facts contained in the books, or the ideas, wouldn't you?

A. Yes.

Q. Did you make any attempt to memorize the language or form of expressions used in any of the books?

A. None whatever. I had no time for that. Even if I had wanted to it would have been an impossible task.

Q. In such cases as you would want to quote from a letter or a telegram, would you make a note of that?

A. If I had the book I would stick one of those slips in.

Q. You mean if you owned the book?

A. Yes. If I were using it in a library, then I would have to take a note on anything handy in my pocket. Sometimes I would carry a sheaf of paper and sometimes I would be caught without it.

Q. So that the only time when you would want to take the thing in haec verba would be when you would want to

quote from a telegram or something like that that you wanted for your story?

A. Not necessarily quote from. When it was some-
621 thing consisting of details that I wanted to be sure that I had in proper sequence, or details, mass of details that I wanted to have completely in my mind, then I might copy it down on a note so that I could look at the note and refresh my mind later, even without quoting verbatim from it.

Q. When you read Dr. Eisenschiml's two books at the time you described, before you wrote this article here, you didn't consciously or unconsciously memorize his language, did you?

A. No, I should say not.

Q. His form of expression is what I mean?

A. No.

Q. Are you familiar with the manner in which other writers compose?

Mr. Gertz: Objection.

A. Only a limited few.

Mr. Gertz: There are as many methods of writing as there are authors.

(Discussion off the record.)

Q. Let me get this straight, this Sam'l Cox business. Let me see if I understand this. Eisenschiml has in his books—I am referring now to quote 35 in the affidavit,
622 "In a diary O'Beirne wrote, Samuel Cox * * * his mill servant states * * * that Cox had been cooking provisions lately and carrying it down to persons in the swamp * * *". If I understand your testimony on both direct and cross correctly, the only place where you have ever seen the exact purported words of O'Beirne's diary are at this passage in Eisenschiml?

A. That's right.

Q. You had never seen the O'Beirne diary?

A. No.

Q. But did I understand you to say that the fact about what Samuel Cox had been up to as stated there as distinguished from the expression in haec verba was stated by many other authorities?

A. Yes. You would find it in the transcript of the trials and in any number of authorities.

Q. Is this a fair statement, that you, when you read this exact quote of O'Beirne's diary in Eisenschiml, did you understand that to be a statement by a distinguished and reliable historian to the effect that O'Beirne's diary did actually state that as a matter of historical fact?

A. I did.

Q. Did you feel that Dr. Eisenschiml, in publishing 623 that, was stating a historical fact?

A. I did.

Q. Will you turn to page 143 of Plaintiff's Exhibit 1. Then have before you page 132 of your manuscript. Now Mr. Gertz was questioning you yesterday on portions of the manuscript which had been excised by the editors, the defendant; do you remember?

A. I do.

Q. And he called your attention to some material there in your manuscript about Stanton and that diary. Do you remember?

A. Yes.

Q. Then he called your attention to page 143 of Plaintiff's Exhibit 1. I think you said there that it seemed to you that the language was very close and I think you said that you were shocked or something like that. Do you recall that?

A. I recall saying it. I don't recall the particular—

Q. Will you read me the language in your manuscript which was cut out there about Stanton and that diary, and then the language in Plaintiff's Exhibit 1 at page 143

about Stanton and the diary that you had reference to when you gave your testimony? When you find it, just
624 read it out loud.

* * * * * *

625 A. I think this must have been the part to which you refer. "To those who knew Stanton's characteristics and training, it must have appeared very improbable that he would have accepted a mutilated piece of evidence without severe cross-examination. That Stanton really had taken over the diary without comment had been corroborated by Lieutenant Colonel Conger and was not denied by the Secretary. All in all, Baker had had decidedly the better of the argument".

Mr. Gertz: That's the end of a quote from Plaintiff's Exhibit 1, page 143?

Mr. Martineau: Right.

Q. Now read what you said in the manuscript that was cut out by the editors on that subject?

A. I said on page 132 "This was obviously weak. Nobody could quite conceive of the almight Stanton complacently accepting the mutilated diary without demanding to know where the missing pages had gone. And Baker had his witnesses to swear it had been whole".

Q. Is that what you—

A. Now I am shocked that I was shocked, if this was it. I don't see any remote comparison.

626 Q. Calling attention to your manuscript, the fact you just read, had you read that in other works besides Eisenschiml? Is that in Baker's book?

A. Well, the facts are in Baker's book, yes.

Q. I mean the facts about this diary and handing it to Stanton and all that sort of thing. Is that your memory of it now?

A. My memory of it is that it is in Baker's book, yes

Q. In other words, is it your understanding that Eisen-

schiml is or is not the first man ever to call attention to the fact that that diary had been mutilated?

A. No, that was one of the mysteries of the assassination before Eisenschiml's book appeared.

Q. By the way, on the subject of mysteries, I think there is some claim here that Dr. Eisenschiml is the first man who advanced the idea that there was a mystery about Lincoln's death?

A. Yes. Well, that's a preposterous statement because there has been a mystery about Lincoln's death on the lips of responsible people from the first hour after the shot was fired, and right on through.

Q. As far as your research has determined, was there a Congressional investigation?

627 A. Yes, there was.

Q. In which there are statements made time after time that there was a mystery about Lincoln's death?

A. Yes. It was an attempt to solve the mystery of Lincoln's death which was already so talked about, the government couldn't ignore it. They had to do something about it.

Q. Was it further, according to your research, bruited about that there were a lot of higher-ups and persons in the government who might or might not be implicated in Lincoln's death?

A. It is my understanding that that was one of the constantly reiterated accusations which led almost directly to the impeachment of Johnson, among other things.

Q. Is it your understanding that after everybody has, up to date, written all he has got to say about it, including Dr. Eisenschiml, that there is still a mystery about whether Stanton was or was not implicated with Booth and who was implicated with Booth?

A. There are hundreds of mysteries that will probably remain unsolved forever.

Q. You don't understand that Dr. Eisenschiml purports to have solved the mystery?

628 A. No.

Q. He has only pointed out the way—

A. I think he would not claim that himself. He is very careful about that.

Q. What about this Chapel Point that Mr. Gertz asked you about? Where is Chapel Point? Is it on the map and all that?

A. It appeared not to be on any map there anyhow. He says it appears on no map and I will accept his word for it, having no way—

Q. Let me ask you this. Was there in this world a place called Chapel Point, whether it was on a map or not on a map?

A. Yes. It was at least a geographical designation.

Q. That's what I say, a geographical designation. So whether it was on a map or not, it did exist under that name so far as you know?

A. Yes.

Q. Where had you seen references to Chapel Point other than Eisenschiml?

A. Well, in Baker's book for one, and in Homer Bates. And as a matter of fact there is another one that never occurred to me before, but there are at least two or
629 three very good books on the history of the military telegraph which I had never thought to refer to, and it may be where I got some of the information. I couldn't recall, but in the story, The Military Telegraph, you have that, Beckwith, the cipher operator opening the first telegraph line at Chapel Point there because there was none in existence and they needed contact with Washington. At least two books on the military telegraph and, damn it, right in one of those ten volumes. It's in there too, I remember now. There may even be a picture of it. I wouldn't be surprised if there is.

Q. You mean one of the ten volumes on your pictorial history of the Civil War?

A. The one where he was questioning me as to why I had to have ten volumes.

Q. Would it take too long to find that out now?

A. I don't think it would.

(Discussion off the record.)

A. I don't find it. If you still want it, I will make the effort later.

Q. But you do understand that there was a place actually called Chapel Point and you have seen it in other works, other than Dr. Eisenschiml?

630 A. Yes. Now a whole new field has been opened up. Now I remember even military telegraph books which I read and I will bet a nickel there are maps too.

Q. One question about your manuscript which was Defendant's Exhibit 2. Mr. Millard, a question or two about your original manuscript which is Defendant's Exhibit 2. Now Mr. Gertz questioned you at length about the parts which had been removed by the editor, cut out, the piece having been cut approximately in half?

A. Yes.

Q. He asked you questions as to the source of information contained in those excised parts which were never published in the article here complained of. Do you recall that?

A. I do.

Q. Now in preparing to testify here, you did not, I take it, prepare cards or any material to cover those parts which were cut out of your original manuscript?

A. No, I did not. In fact, I didn't even bring my carbon so I didn't know what parts had been cut out until this was handed here as an exhibit.

Q. In other words, had you known that you were going

to be examined at length on that by either Mr. Gertz
631 or myself, would it have been possible for you to have run down your sources on that and prepared cards just as you did with respect to the article complained of here?

A. Yes.

Q. Turn to page 70 of your manuscript.

A. I have it.

Q. Mr. Gertz asked you about that part there "What did Ward Laman know." Read that.

A. "What did Marshall Ward Laman know or suspect that he never revealed? Laman's loyalties were never questioned, but perhaps his judgment should be. Why emphasize the theater, whose bright lights and watching crowds made it the most unlikely place for the dark deed of assassination unless he had some special hint or knowledge of such a plot?"

Q. Then he called your attention to page 21 of Plaintiff's Exhibit 2 which was In The Shadow of Lincoln's Death. Read me the part there about Ward Laman.

A. I have a suspicion that this is where I made that remark that I was shocked, but maybe not. Anyhow, the first sentence is "What did Laman know that he never told? How much did he suspect?" That apparently is as far as he goes.

632 Q. Well, the question is, did you copy the language in your manuscript which was excised by the editors from that book of the plaintiff's?

A. No, I did not.

Mr. Martineau: That's all.

Re-Re-Cross Examination by Mr. Gertz.

Q. Mr. Millard, when did you first have any conversation with Mr. Martineau with respect to your testimony in this case or the issues in this case?

A. The day the hearing opened.

Q. That was the first time?

A. That was the first time I met him.

Q. How long was that first conversation?

A. Well, it extended from whenever I arrived in the morning, I don't remember the time, until most of the time, not all of it, but most of the time, I stayed here to talk until you arrived, or we had just gone down to lunch and came back and you and Dr. Eisenschiml were here.

Q. A few hours?

A. Yes. Not over three hours at the most, I would say.

Q. And in that conversation you discussed the nature of the questions to be put to you by Mr. Martineau?

633 A. Yes.

Q. And what might be anticipated as to my cross-examination?

A. Yes.

Q. And did you also have conversations at any time with Mr. William Flannery again who is present here?

A. Yes, I had a few with him. None of very long duration or very detailed.

Q. Extending over a period of time?

A. I would say a total of two hours for all the times we have talked, probably.

Q. Did you also have any conversations with other attorneys with respect to your testimony in this case?

A. I met Lonergan, but I doubt very much if there was any conversation on the case. We were talking about it. He came in and we were introduced, but I don't recall any conversation with him was held on it.

Q. From the time Dr. Eisenschiml made the complaint to the time of the hearing, the deposition, did you have conversations with any attorneys with respect to the subject matter?

A. No.

Q. Do you recall signing an affidavit in response
634 to Dr. Eisenschiml's affidavit?

A. Yes.

Q. Who wrote that affidavit in response?

A. It was, I believe, the substance taken from a letter which I wrote to Mr. Flannery and got it back in the form of an affidavit, substantially as I wrote it, if I am not mistaken.

Q. Did you have any conversations with respect to it?

A. No. He wrote and asked me to do this and I did.

Q. Did I understand you correctly to have said that during the course of your writing career, that is, in the last sixteen years, you have written at least a thousand articles?

A. Articles and stories, I would say yes.

Q. It could be considerably more than that?

A. It could be.

Q. In other words, you are a pretty prolific writer?

A. Yes.

Q. And you don't allow yourself a lot of time for research generally?

A. From my standpoint, from the standpoint of a writer,
a lot of time. From the standpoint of a Dr. Eisen-
635 schiml who is researching independently and without
expecting to make his living out of it, very little time. From my viewpoint, a great deal of time.

Q. Have you any idea as to how many articles a year you have been writing since 1951?

Mr. Martineau: You mean articles and stories?

Mr. Gertz: Yes.

A. Articles and stories, no, I wouldn't. I could tell you exactly if I had my books here, I mean my records, and I could get the information for you.

Q. It's a large number, at any rate?

A. Not as large a number as in prior times, but a reasonably large number.

Q. Did you write to anyone at all asking permission to use any material in connection with your article?

A. No, I did not.

Q. You mentioned you edited a publication in Mount Morris, Illinois?

A. That's right.

Q. What publication was that?

A. How to tell?

Q. Was that a trade journal?

636 A. Yes, I guess it would qualify as a trade journal. It's a magazine for direct salesmen.

Q. When Mr. Martineau asked you questions with respect to paragraph 20 of the Eisenschiml affidavit and as to certain sub paragraphs therein, you stated that those sub-paragraphs "are the ones I would look at and pick today" or words to that effect?

A. Something like that, I guess, yes.

Mr. Martineau: Look at and pick today?

Mr. Gertz: Yes.

Q. Was it your intention to indicate that at the time you wrote your article there might have been others also?

A. No. It was my intention to indicate that when you asked me the question originally last evening I was getting in a mental state where I might have accused you of assassinating Lincoln and be serious about it.

Q. In other words you really didn't mean then that they were the articles that you had recalled today, but they were also what you would have recalled or what you had in mind at the time you wrote the article?

A. Yes. What I put in today I meant in contrast to last night. I was only trying to cover myself in case
637 I disagreed with what I picked last night because I really don't remember last night. I say last night. I mean late yesterday afternoon.

Q. When you wrote your article you knew that the

Eisenschiml books referred to in this case were copyrighted?

A. Yes, sure.

Q. What do you understand copyright to be?

Mr. Martineau: Objection.

A. I understand it to mean two different things, depending on whether you are referring to fact or fiction. The field of history, I understand copyright to be a legal protection to a writer against copying or pirating his words and expressions, not facts which were in existence before him and over which he had no control.

Q. Did you understand at the time you wrote your article that you had the right to use any factual material found in copyrighted books without looking at the original sources?

A. Yes, I thought I had the right to.

Mr. Gertz: Will you mark this as plaintiff's exhibit 6 for identification, Hassan's American and European
638 distance tables or Stranger's Pocket Companion, revised edition, T. V. Hassan Company, Philadelphia.

(So marked as Plaintiff's Exhibit 6 for identification.)

Q. When did you first learn of the existence of the booklet, Plaintiff's Exhibit 6 for identification?

A. I don't remember.

Q. At any rate, it was after the publication of your article?

A. No, I have had this information a great long time.

Q. But you did not use it in connection with your article?

A. No.

Q. Does this publication have the time table of the Camden and Amboy—

A. No, it has a Camden and something else, Camden and Atlantic, which I believe was a change of name and a combination of roads.

Q. Is there anything in Plaintiff's Exhibit 6 for identification which tells what the schedule was in 1865, April 14, 1865?

A. No. None whatever.

Q. Do you know whether or not railroads fre-
639 quently changed their time tables in that period?

A. They changed them very frequently, as I understand it, at that period, yes.

Q. So that getting a later or earlier time table really wouldn't give you the time table for April 14, 1865?

A. If I got it early enough—

Mr. Martineau: He never pretended he did. We will stipulate that it does not, of course.

Mr. Gertz: I want to get this straight.

Q. You state in your own words what you thought the pertinence of this particular document is to the issues in this matter. Is that fairly stated?

* * * * *

640 A. I think Mr. Gertz has overlooked or forgotten or didn't hear me when I was helping list these books the day the hearing opened, that this didn't rightfully belong here. It's one that I had dug out in writing the article, thinking that it would give me the same information. I saw that it didn't and didn't use it, but tucked it with the books so that it came with my books without actually having the value now I thought it was going to have when I got it. Then after you brought up the question I then referred back to it, pulled this out of thin air to say that, well, this shows that I could have got even prior ones.

Mr. Martineau: Prior what, Mr. Millard?

A. Prior dated tables.

Mr. Martineau: What you mean is that that, while not directly pertinent in itself, does or might suggest

to you that there were prior tables which you might get but didn't get?

A. That's right, yes.

641 Q. Are you just surmising that there are prior tables?

A. No, he says here that this supercedes—wait a minute—somewhere, for the effect.

Q. Point to the specific passage.

A. "Owing to the public demand for a larger and more complete work and one showing distances on all railroads in the United States and Canada, the book known as Hassan's "Dime" Distance Tables has been withdrawn, and the present enlarged and revised edition is issued in it's place".

Q. But you never say the earlier—

A. No.

Q. You don't know what the earlier ones say?

A. I don't know.

Q. You don't know whether or not they give anything other than distances, do you?

A. No, I do not.

Q. At any rate, you never consulted any of the earlier books?

A. No. I have testified to that repeatedly that I didn't. This came in by accident. It really had no place in this whole controversy.

642 Q. Now, Mr. Millard, apparently Mr. Flannery or Mr. Martineau will say I misunderstood what you said with respect to the pile of books, magazines, and newspapers on the ledge in this office. Am I correct in assuming that those are publications which you regard as pertinent to the assassination story?

A. I said they were publications. I believe the words I used were that these are some of the publications I used when preparing myself to write the story.

Q. In other words, many of them are simply background material?

A. That's right. A great many of these, as I explained this morning. I buy the background books because I can use them generally, but specific books that I could only use once, I do not invest in if I can avoid it.

Q. And relatively few of these publications actually are pertinent to the assassination story; directly pertinent, I mean?

A. I would not say relatively few. I would say at least half of them do not.

Mr. Martineau: Do not?

A. Do not.

Q. There is a big pile of journals of the Illinois State Historical Society which you will recall was listed 643 earlier in your direct testimony. Could you tell easily which ones of those journals pertain to the assassination story and which simply are background material?

Mr. Martineau: Can you answer that question without looking at them?

A. One is December 1946 and there is, I believe, a September issue. December is the one, I think, with Luther Baker's story in there, and there is one eye witness account of the assassination in another and there is some Boston Corbett material in something else. There are possibly four or five or six direct material.

Q. Six at the outside, and perhaps less?

A. Yes, perhaps less.

Q. And the other Illinois journals are just of general relevance in the Civil War?

A. Yes.

Q. There is a pile of approximately fifty books that are separated on the ledge. Could you readily, just by glancing through the titles, tell me how many of that pile

has any direct relevance or pertinence to the assassination story?

A. Yes, I could, looking just from here without taking the piles apart, I would say almost every one of them.

644 You had picked a very nice pile here, including many books that I would have selected for that purpose.

Q. The Treasury of American Folklore, for example?

A. Yes, Treasury of American Folklore contains eight stories or legends or some things directly associated with Abraham Lincoln.

Q. To the assassination?

A. Not to the assassination specifically.

Q. My question pertains to the relevance or pertinence to the assassination story.

A. All right. The fact of Lincoln's existence is of prime relevance to the assassination.

Q. In other words that pile of books pertains to Lincoln, not necessarily to the assassination?

A. Yes, to Lincoln, the figure who was assassinated, and whose character, and whose enemies and friends, and problems, are probably holding the key to the mystery of the assassination.

Q. In other words you didn't intend to say that they were directly pertinent to the assassination itself?

A. No. In fact, I doubt if there are a dozen books here that are directly relatively pertinent to the points of

645 the assassination brought out here, but assassination was the culmination of something and the assassination is only a climax.

Q. Did I understand you to say in your redirect examination, Mr. Millard, that there were many publications which, prior to the Eisenschiml books, which linked Stanton with the assassination?

A. No, I am sure I didn't say that.

Q. Or other higher-ups with the assassination?

A. Higher-ups, yes.

Q. Which higher-ups do you have reference to?

A. I don't know and I don't think that was ever revealed.

Q. Which particular words do you have reference to, published prior to Dr. Eisenschiml's books, which linked higher-ups with the assassination?

Mr. Martineau: You mean works or just in the sense of—

Mr. Gertz: It could be periodicals.

Mr. Martineau: Congressional records or anything like that?

Mr. Gertz: Sources of any kind and printed material of any kind.

Mr. Martineau: Anything published. Is that what 646 you mean?

Mr. Gertz: Yes.

A. I am positive that many newspapers did, and I know for a fact that the Congressional Globe made many allegations and many direct charges building up to the general investigation, the Ben Butler Committee, and the impeachment of President Johnson. They were outgrowths of that very statement and on the streets of Washington or even in—I am not positive about the newspapers—but it is the generally accepted fact, I believe, that President Johnson was almost immediately whispered and suspected of complicity, and Vice-president Johnson was about as high as you could get in the government with Lincoln about to be out of the way. So there is one case alone and I could multiply that with considerable brainracking or hunting.

Q. At the time you wrote your article, were you aware that the Eisenschiml books were regarded as original studies of the subject of the assassination?

Mr. Martineau: What do you mean by original? It's a historical work.

Q. That they contain original and novel material and analyses?

647 Mr. Martineau: If they are historical facts, Elmer, how could they be a novel? He is just reciting something that happened in history.

Q. Will you answer, please?

A. I am hesitating over my answer for quite a different purpose than you might think. In the first place, my own feeling toward them was that they were outstanding authorities on it, but I was also aware that my feeling was not shared by other authorities, some other authorities; that there was a considerable split—was at that time a considerable split of opinion as to whether Dr. Eisenschiml was a research genius or a man who had gone off the deep end on an idea and was trying to document a weird idea.

Q. But you were aware that many leading historians regarded his writings as novel and original?

A. Yes, I would say so.

Q. And you discussed the subject with Dr. Paul Angle, did you not?

A. Yes, I must have. I have no recollection of any conversations with Paul, but I am sure that he must have been the subject part of the time.

Q. And as a matter of fact, Dr. Angle told you
648 that Dr. Eisenschiml's work were original and novel works in the field?

A. I don't think he told me that. He would not have to, particularly.

Q. Because you knew it already?

A. Well, yes. Wait a minute.

Mr. Martineau: What do you mean by 'original?

A. Original and novel? That they were outstanding works. Let's say I knew that they were outstanding works.

Q. Unlike anything else written in that field?

Mr. Martineau: Naturally.

A. I will say no to that.

Mr. Martineau: Let's understand each other. Do you mean by original and novel, are you trying to trick the witness into saying that these were works of the imagination of Dr. Eisenschiml?

Mr. Gertz: Off the record—

(Discussion off the record.)

Q. So far as the story of the assassination is concerned, would not you regard Eisenschiml's books as unique?

649 A. No, I don't believe I would.

Q. What other books on the subject would you regard as unique?

A. I would regard Father Chiniqui's book as unique.

Q. Any other book?

A. I could think of more, I think. There is one, the name is on the card there. I have before me a book "The Unwritten History Of The Assassination Of Abraham Lincoln" by Richard Mitchell Smoot, published in 1908, which, among other things—now first, that calling it the unwritten history is an implication right there that he is about to try to reveal something about an unsolved mystery and he certainly antedates Dr. Eisenschiml by a great length of time. Also, the book places a great deal of emphasis on John Surratt and his flight and trial, which antedates Otto Eisenschiml's exploration of that subject, so on that score too I would not call Dr. Eisenschiml unique. I would call him immensely authoritative for a change. In that he is unique.

Q. Mr. Millard, in addition to the sixty-six or sixty-seven items that are set forth in exhibit C of the Eisenschiml affidavit and the items which are in paragraphs

nineteen and twenty of the Eisenschiml affidavit, are
650 there not other historical facts and historical material common to both your article and the Eisenschiml books?

A. And others. If you will add that, I will say yes.

Further Redirect Examination by Mr. Martineau.

Q. Mr. Gertz asked you, or I think you said this in response to one of his questions in substance that you thought you had the right to use factual material where it was presented in copyrighted works as factual historical data, without examining the original sources. My sole question is, did you in many instances attempt to examine original sources?

A. In all instances I attempted to. In many instances I was unable to without taking a lot of expensive trips to the places where that source material was.

Q. In other words you didn't just sit down at your desk and take Eisenschiml's books and say in effect to yourself, this is pretty good stuff. I think I will just appropriate this without running down any of the original sources and write me a story, is that right?

Mr. Gertz: Objection.

A. That's right. I did not.

Q. As you testified, you spent several months in
651 research running down original sources wherever possible?

A. That's right.

Mr. Martineau: That's all.

Further Re-Cross Examination by Mr. Gertz.

Q. Some question has been raised by historical facts in quotes. What do you mean by your phrase "historical facts" as you have used it in your testimony in this case?

A. To me a historical fact is an incident that occurred, a person who lived, or I would expand it to include a publication of a newspaper, a pamphlet, a magazine, or the fact of a book, that I consider those historical facts.

Mr. Martineau: You mean the facts contained in the books as distinguished from the expression?

A. I mean the fact that a book has been published. I would not narrow it down, be so general as to say anything inside any book.

Q. Do you include in your conception of historical facts inferences or surmises drawn from factual material?

A. Yes, I do because most history begins as in-
652 ference or surmise and without it there would be no curiosity, no research, because those inferences and surmises are only expressions of curiosity and without curiosity there would be no history, historical research, no history written, I would say.

Q. But you don't include the language in which the historical facts are set forth?

A. That I do not.

Q. Everything except the language, is that right?

A. That's right.

Q. When you refer to historical facts in your testimony you refer to everything with respect to factual material except the very language used in expressing it?

A. That's right.

(2:45 P. M.)

662 DEPOSITION OF RALPH DAIGH.

* * * * *

663 Also Present: Dr. Otto Eisenschiml, the Plaintiff.

* * * * *

663-a RALPH FOSTER DAIGH, residing at 1405 Park Lane, Pelham Manor, New York, having first been duly sworn by Harold T. Young, a Notary Public in and for the State of New York, was examined
664 and testified as follows:

* * * * *

697 *Redirect Examination by Mr. Gertz.*

* * * * *

700 Q. Was this article turned over to the research department or this manuscript, I should say?

A. It isn't ordinary that a manuscript will be turned over to the research department of any periodical.

701 Q. Do you have a department at "True" or Fawcett Publications which attempt to verify anything contained in manuscripts submitted?

A. Not anything contained but we do have a research department, part of whose function is to verify any disputed or questioned portions.

Q. Prior to the publication in February 1953, the February 1953 issue, was the Millard manuscript turned over at any time to that department?

A. I am sure it would not be turned over to them. I don't know whether any of our editors asked the research department to do research on questioned or challenged facts in the manuscript.

Q. Have you been told by anyone connected with "True" or Fawcett Publications that the manuscript of Millard was turned over to that department?

A. No.

Q. Were it turned over, who would be the one to do that?

A. Well, it wouldn't be turned over. It might be that a page or several pages might have been turned over, although I have no actual knowledge of this case.

Q. Who would have actual knowledge?

702 A. The research department.

Q. Who in the research department?

A. A girl by the name of Beatrice Butler who is no longer employed by this company.

Q. Where does she now reside?

A. I don't know.

Q. Where is she now employed?

A. I don't know.

Q. How long was she employed by you?

A. I don't know.

Q. But she was the one in charge of that department at the time Fawcett Publications had possession of the Millard article?

A. That's my memory.

Q. Do you know if any proofs of the article were submitted to Millard?

A. No knowledge.

Q. Do you ordinarily submit proofs of articles to authors?

A. No, nor is it customary in the publication of periodicals.

Q. Do you have any department at Fawcett Publications which determines prior to publication whether there are any copyright infringements in an article or manuscript?

703 A. We have a wonderful machine for that called an editor.

Q. In other words, the function of the editor is to determine whether or not there is any infringement in an article?

A. It is part of the function, but I must add that even more important is the reliability, honesty, known integrity of the contributor.

Q. In other words, because you had published Millard's articles before you assumed, without making an investigation, that there were no infringements?

A. Not only had we published them but other publishers had published them and to my knowledge there has never been a legitimate complaint against this man's writings.

Mr. Martineau: So your answer is yes to Mr. Gertz' question, isn't it, with that addition?

The Witness: Yes.

Mr. Gertz: That's all.

Mr. Martineau: Let me just ask you two questions, Mr. Daigh, and then we will let you go.

Recross Examination by Mr. Martineau.

Q. Did I understand you to say that unless some question of a dispute is raised prior to publication con-
704 cerning any given article or any proposed article to be published, there is no occasion for turning it over to this research department for verification?

A. That's correct.

Q. And as far as you know, no question of any disputed fact or anything like that came out in regard to this publication here in question before it was published?

A. I have no knowledge of any.

Q. I don't know whether I showed you Defendant's Exhibit 3, whether you studied it or not, that form of contract with Joseph Millard dated January 30, 1952?

A. Yes, I have seen this.

Q. Is that a regular form of contract used by the defendant?

A. It is

Q. And the defendant then relies on the warrantee of the author as to originality and so forth of the article submitted?

A. Yes.

Mr. Martineau: That's all. Thank you.

Further Redirect Examination by Mr. Gertz.

Q. Beyond that warrantee you don't make any
705 further check?

A. Are you telling me or asking me?

Q. Or do you?

A. I think I have explained that in cases of dispute or intelligent doubt, we certainly do make a check and we do employ research people whose job it is under those circumstances, but we nor any other periodical publisher examines every line of everything printed for validation. It would be physically impossible.

Q. Now you issue a line of paper books, don't you?

A. Yes sir.

Q. In connection with those paper books, do you make any further effort at verification or checking of infringement?

A. I don't know what you mean by "further effort" in verification.

Q. Before you publish a book in your paper line series, do you make any effort to discover whether or not there are copyright infringements?

A. Well, certainly it is the basic responsibility of an editor to have knowledge that guards him against infringements. The biggest area in which we take steps to protect

ourselves are in the matter of titles and before we use
706 a title we check all known sources to see if by any
chance we are duplicating a title that some one else might claim a proprietary interest in.

Q. Before you publish a book, do you require the author to submit his sources and his credits?

A. A book?

Q. Yes.

A. Are we now in the book business?

Q. That's part of the Fawcett Publications, Inc. You, as I understand, talked in terms of publishing the Millard manuscript in book form.

A. That's erroneous. We never considered publishing his manuscript as a book, to my knowledge.

Mr. Gertz: That's all.

(The witness was thereupon excused.)

* * * * *

1 IN THE UNITED STATES DISTRICT COURT.
(Caption—53-C-1912)

REPORT OF PROCEEDINGS had and evidence taken in the above entitled cause before Honorable Joseph A. Graber, Special Master of said Court, at Room 224, Federal Building, Monroe and Clark Streets, Chicago, Illinois, beginning at the hour of 10 o'clock a. m., on the 17th day of November, A.D. 1954, pursuant to an order of reference heretofore duly made and entered in said cause, and due notice given.

Appearances:

Mr. Elmer Gertz, on behalf of plaintiff;

Kirkland, Fleming, Green, Martin & Ellis, by Mr. J. B. Martineau, and Mr. Don H. Reuben, on behalf of defendant.

89 DONALD W. RIDDLE, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Gertz.

Q. What is your name?
A. Donald W. Riddle.

105 Q. Now, will you give all of the parallel passages which you found other than the ones you have just given?

Mr. Martineau: While he is doing that, Elmer, do the 85 include the 13?

Mr. Gertz: Yes.

Mr. Martineau: It does?

The Witness: Yes.

Mr. Martineau: So that will be 72 more, won't it?

Mr. Gertz: Of course, we can do this, if you are willing for the purpose:

Q. You have marked all of those passages, haven't you?

106 A. Yes.

Mr. Gertz: What we could do is to have some general questions with respect to the document, and simply offer the document, and that will save a lot of time in the record, and you will have the opportunity to cross examine.

Mr. Martineau: If I have the right to study it and ask the doctor to come back and cross examine him on it—

Mr. Gertz: If we can agree upon a convenient time, bearing in mind—

The Witness: I assume that, Mr. Martineau.

Mr. Martineau: Upon the doctor's convenience. It would save a lot of talking, won't it?

Mr. Gertz: Yes.

Mr. Martineau: Why don't you describe it in a general way or give a couple of them or something?

The Wintess: It would take a good deal of time to go through it.

Mr. Martineau: No, I think I want him to testify to it, I think I do.

The Master: If he doesn't I am going to have quite a tough time doing all this comparison myself when I am reading the record.

107 Mr. Martineau: Yes, I am sorry to have interrupted. I think it would be better.

Mr. Gertz: Q. Will you give all the 85 examples of comparisons in language—

The Master: I would have to dig those 85 out, eventually.

Mr. Gertz: Yes.

Mr. Martineau: This is an unusual subject matter, isn't it? I know I can get confused.

Mr. Gertz: What I am going to do is do it both ways. I will introduce the document and I will also have him testify to that.

The Master: That is all right.

* * * * *

109 Mr. Gertz: Now I am also going to do it the other way, have him read into the record the different passages so that both will be before the Court. In a sense it is repetition, but we will have all the passages in one way because Mr. Martineau says he would prefer having it that way, and rather than—I don't think it is necessary, frankly, but rather than to have any possibility of error I would have it done even though it is repetitious if you still insist on it.

Mr. Martineau: I do I do. I think it would be more helpful to the Court to hear the man—

The Court: Much more helpful. In other words, I would have to take these exhibits and go all through them and check them as against the two volumes here.

* * * * *

110 The Witness: Will the Court instruct me, please? Shall I read the passage in the Millard article?

Mr. Gertz: Yes.

The Witness: Or merely refer to it.

The Master: Read the passage in the Millard article and then read the passage in the book.

Mr. Gertz: Yes.

Q. Where it is a very long one you might state—

111 Would this be satisfactory, your Honor: If it is a very long one, say several paragraphs, to state page such and such, column such and such, the paragraph which begins with such and such words and ends with such and such words?

The Master: Well, it might be all right, but then you would still have some confusion.

* * * * *

118 Q. You don't have to read it if you read it before. That is our understanding, isn't it, Jack?

Mr. Martineau: Sure.

Mr. Gertz: The 13 that were read before don't have to be read.

119 Mr. Martineau: Unless the Judge wants it all tied in together?

The Master: Why not tie it all in together?

* * * * *

172 THOMAS J. NAUGHTON, was called as a witness on behalf of the defendant, and having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Martineau.

* * * * *

176 Q. Mr. Naughton, do you remember when you first saw that manuscript? Why don't you begin at the beginning and tell his Honor your own connection with this, how it came to be written.

A. How it was written and how we came to buy it?

Q. If you will.

A. Well, some time before I ever saw this manuscript, I can't date it exactly, I would say probably in the middle of '51, when I was handling booklengtheners on True, I was talking to Millard—

* * * * *

178 I suggested to him that there might be a good story in some of the mysteries and peculiarities surrounding the murder of Lincoln. I thought of Joe in connection with this story, because I knew he had been a student of Lincoln

for a long time. He had done two previous booklengtheners for us on the Civil War period. In fact, I think it was from one of those that I had got the idea for this story.

Mr. Martineau: Q. To refresh your recollection, do you remember the name of that one?

A. Our title on it was, "The Devil's Errand Boy." It was about Lafayette Baker.

. . . . . .

179 Mr. Martineau: We can agree it was.

Q. Go ahead.

A. Well, Millard said, "Fine," and the next I heard from him was when I got this manuscript. He knew as well several booklengtheners for us before. He knew as well as I do that our length was 20,000 words, but this one for some reason he wrote to 40,000 words. I figured his enthusiasm carried him away; and I had to cut it. I called him up and asked his permission to cut it before submitting it for final acceptance, because I didn't want to mark up a manuscript that still belonged to him without his permission. He gave me the permission, I cut it and sent it around the office for comments, and then the comments being favorable, it went upstairs, it went to Ken Purdy and then it went to Mr. Daigh for purchase.

Q. Right there, might I ask you this question, Mr. Naughton? Did you discuss any specific cuts? Don't tell what they were, but did you discuss any specific cuts with Mr. Millard?

A. No.

. . . . . .

180 Q. Was this comment sheet made out by you when you sent the manuscript upstairs?

A. Yes, it was made up by me when I wrote my
181 comment, which is the comment that appears first on it.

Q. I won't read it all, but you mean the one that starts,

"1/18. A booklengthener on the assassination of Abraham Lincoln which begins by describing it as the greatest unsolved murder of all time."

Then there are two paragraphs with rather heavy type with the designation, I note the signature designation T. J.N. Those were your own initials?

A. Yes.

Q. And that was sent up to whom?

A. Then that went to another reader in the office. This second comment beginning, "This is a wonderful story and it may well prove to be the only concise summary surrounding the strange facts of the assassination," and the signature initials C. N. B. are the initials of Charles N. Barnard, who was another associate editor at that time.

Q. Then there is one of just two lines at the bottom, "A rarely good one, well written," and so forth, and that has initials K. W. P. Is that Purdy?

A. Ken Purdy, yes.

Q. Ken Purdy. Now, was that part of the regular routine?

A. Yes, sir.

* * * * * *

182 Mr. Martineau: Q. What next happened in connection with the publication of the story after the comment sheet went upstairs?

A. Well, it was approved for purchase by Ralph Daigh, then it came back down to us and payment was put through in the usual routine, and then the manuscript was copied, probably photostated, and given to the art director for him to read and get an artist to illustrate it, and then while the manuscript itself, having already been cut and pretty well put in shape, it was then just stuck in the file. We kept it around longer than usual, because we wanted to hold it for the February issue.

* * * * * *

183 Mr. Martineau: Q. Had you ever ever read either the works of the plaintiff, Dr. Otto Eisenschiml, the first one, "Why was Lincoln Murdered," and the second one, "In the Shadow of Lincoln's Death," at the time or prior to the time you are describing?

A. No, sir, I had not.

Q. Had you heard of Dr. Eisenschiml?

A. I had heard his name. I think I had read it.

184 Q. But had not read his works?

A. No, sir.

Q. Was anything said at any time about checking this manuscript for copyright infringement, or any of that sort of thing?

A. No. No, the question never came up of any copyright infringement. We were dealing here with a writer who had written five or six booklengtheners for us previously, a writer whom we regarded as reliable, especially knowledgeable in his field.

Mr. Gertz: I would like to have that answer stricken.

Mr. Martineau: Let's let him finish it first, if you don't mind.

The Witness: He is a professional writer, has been for a long time, and no professional writer will infringe copyright if he is competent, because he puts himself out of business once he does that.

Mr. Martineau: Q. You mean that is your experience?

Mr. Gertz: I move the entire answer be stricken.

The Master: It may be stricken.

Mr. Martineau: Q. What has been your experience, Mr. Naughton, in the magazine field as to the fate befalling the professional writer who deliberately infringes the copyright field; just copyright?

185 Mr. Gertz: Objection.

The Master: Sustained.

* * * * *

Q. I see. Can we find quickly in the original manuscript here the reference to Dr. Eisenschiml?

186 A. I can, yes. It may take a little while. It is a long while since I have seen this. Yes, here it is.

* * * * *

188 Q. Will you tell his Honor why you cut that part out about that incident?

Mr. Gertz: Of course, I object to the question as to why. If you want him to answer, so the record will be complete, you can do it, but I object to it.

The Master: I think the objection should be sustained.

Mr. Martineau: You don't wish the answer then as to why he cut it out.

The Master: I don't see how there is any materiality to it.

189 Mr. Gertz: No. It is like any other why question.

The Master: Well, let him answer.

Mr. Gertz: Subject to my objection?

The Master: He may answer, subject to your objection.

The Witness: Shall I answer?

Mr. Martineau: Q. Yes.

A. As I said, I had to cut this in half, and a lot of material had to go. That seemed a minor incident that we could dispense with, so I dispensed with it.

Q. You mean the doorbell incident?

A. The doorbell incident, yes.

Q. And Dr. Eisenschiml went along with the wreckage, as it were, is that right?

A. That is right.

Q. I mean, you cut that out, too?

A. The only reference to Dr. Eisenschiml was in connection with that anecdote, and when the anecdote went out, Dr. Eisenschiml's reference went, too.

Q. I mean, it wasn't intended as a particular slight to Dr. Eisenschiml?

A. Of course not.

Mr. Gertz: Of course, my objection stands, and I make a motion to strike all of this testimony.

190 The Master: All right. Let it stand.

* * * * *

Mr. Martineau: Q. Will you state what markets
191 generally True Magazine goes to; what market of readers?

Mr. Gertz: Objection.

The Master: Let him answer.

Mr. Martineau: That is perfectly material.

The Master: I understand what he means.

Mr. Martineau: Thank you.

The Witness: It has a circulation, or had, of about a million and a half men readers all over the country. It was a magazine of the general or popular type as distinguished from trade publications or scholarly publications of limited circulation, aimed at a mass audience.

Q. Aimed at a mass audience?

A. Yes.

Q. It wasn't put forth as an authoritative historical journal, I take it?

Mr. Gertz: Objection.

The Master: Sustained.

Mr. Martineau: Q. Have you ever heard of True Magazine being cited in universities or other institutions of learning as an historical authority?

Mr. Gertz: Objection.

Mr. Martineau: Judge, this goes to the market.
192 This is one of the most vital questions of fair use and copyright infringement, and everything else.

The Master: Okay. I will let him answer subject to your objection.

The Witness: I think I have heard of it once or twice.

Mr. Martineau: Q. Do you remember in what instances?

A. No. It was very unusual.

Q. I mean, in historical matters, do you know?

Mr. Gertz: This whole line of questions, of course, I object to.

The Master: Okay. Subject to your objection I will let him answer.

The Witness: I believe so. I can't remember what the stories were.

Mr. Martineau: That is all.

Cross-Examination by Mr. Gertz.

* * * * *

200 Q. In other words, your knowledge of the assassination is derived from Millard's story?

A. Yes, sir.

Q. Have you ever read any lives of Abraham Lincoln?

A. I think I have, but it was a long time ago.

* * * * * *

203 Q. In other words, it is a fair statement to say that neither you nor anyone else at True or Fawcett Publications took any steps whatsoever to discover or prevent possible copyright infringements?

Mr. Martineau: What do you mean? Other than he has described, other than his reliance on Millard?

Mr. Gertz: Q. Other than your reliance on Millard.

A. That is correct.

Q. I want to see if I heard you correctly on your direct examination. I am correct in my recollection, am I not, that after you read Millard's article you stated that it was unnecessary to read anything else on the subject of Lincoln's death?

A. I was joking. After I read Millard's article, what

did I do to study up on the subject to check, do you mean; did I do anything like that?

Q. No, did you comment to anyone else at that time that it was unnecessary to read anything else on the Lincoln death?

A. Oh, no.

Q. Now, who made the determination that the front cover of True Magazine for February, 1953, would refer to, "America's Greatest Unsolved Murder"?

A. And the other references, too?

Q. And the other references.

204 A. Purdy, Ralph Daigh and I.

Q. And who made the decision that on the contents page of February, 1953, issue, the first item under Contents, would be the Millard article?

A. Tradition made that. The booklengthener is always listed at the top of the title page.

Q. So in any issue in which there is a booklengthener it is the first item?

A. The booklengthener runs at the top, yes, the top of the list, yes.

Q. And on the last page of the February, 1953 issue, who determined the placing of the words, "A True book-length feature"?

A. That again was done customarily with all booklengtheners.

Q. So that nobody at Fawcett Publication or True checked sources and credits in connection with the Millard article?

A. Correct.

Q. Prior to the time in 1951 when you had a conversation with Millard about doing an article on the Lincoln assassination, had you re-examined the July, 1947, article of Millard?

A. No, sir.

205 Q. But you had that article in mind?

A. Yes. Pretty far in the back, but it was there.

Mr. Martineau: Elmer, do you mean immediately prior, because he has already testified that he did read it before.

Mr. Gertz: Yes.

Q. On or around this time, within months or weeks.

A. I can say I never re-examined the article. When I edited it once I don't think I ever read it again.

Q. But it made a lasting impression on you?

A. Yes. I have a pretty good memory.

Q. And particularly the portions of it relating to the Lincoln death?

A. Well, I don't say those particularly.

Q. Do you remember the circumstances in which you suggested to Millard that he do an article on the Lincoln death?

A. As I remember it, it was in the course of a telephone conversation I was having with him. I don't think, I am not sure—I am not sure whether the conversation was all about that, or whether it was about some other things as well, any other circumstances.

Q. Do you recall anything else that brought that
206 subject to your mind and caused you to make the recommendation?

A. Well, I had also in mind, as well as that, Baker's story, another story we had run about the Lindberg case, a booklengthener also, which asked a lot of questions, didn't answer them all, but asked a lot of interesting ones, and I sort of put that type of story together with what little I remembered from the Lafayette Baker thing, and mentioned it to Joe as a possibility for a booklengthener.

* * * * * *

207 Q. Did you ever discuss with Millard a book publication of his article?

A. Oh, I think I might have mentioned to him some time that it might make a good book. I remember we had an idea once that we might put that one and the Lindberg case booklengthener that I just mentioned and another booklengthener we had about the murder of Harry Oakes together and make a book.

Mr. Martineau: Who was that, Harry Oakes?

The Witness: Yes.

Mr. Martineau: That was that sensational thing over in the Bermudas.

Mr. Gertz: In the Bahamas.

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213 *Redirect Examination By Mr. Martineau.*

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215 Q. In other words, you knew then before the piece was bought that this form would go out, this form contract, and it would contain this clause here, saying, "The undersigned warrants the originality, the authorship and ownership of said work"?

* * * * *

216 The Witness: The signing of that form was a necessary preliminary to the completion of the deal. Joe had to sign that before it would be completed.

Mr. Gertz: I move that all the questions on that subject and the answers be stricken.

The Master: They may stand subject to your objection.

Mr. Martineau: Q. In other words, if I understand your testimony, sir, before you gave approval for the publication of this story, you knew that Joseph Millard, an author of unblemished reputation, was warranting the originality of this piece?

A. That is right.

Mr. Gertz: Objection.

The Master: Sustained. He doesn't know anything about his unblemished reputation, or anything of that kind.

Mr. Martineau: Let me change the question.

Q. Before you approved—

The Master: In other words, your organization, whenever you accepted this, sent out this particular notice, and somebody signed this notice?

217 The Witness: The author had to sign that before we bought the piece.

The Master: All right. I will let it stand.

* * * * * *

Q. Now, just one more question.

In connection with something Mr. Gertz asked you, that is, as to the time you and he were trying to fix the time when you had this conversation with Joe Millard about the possibility of maybe publishing this thing in book length with some of those other mysteries, do you recall the subject?

A. Yes, sir.

218 Q. Now, the only question I want to ask you is this: Do you recall whether or not that conversation was before or after you had heard of any complaints by Dr. Eisenschiml?

A. I don't remember. I don't remember, but I believe it was before.

Q. That is your best recollection?

A. Yes.

Q. I forgot to ask you this, Mr. Naughton: How long have you been in the publishing business altogether?

A. Oh, since 1941 minus two and one-half years.

Q. For service?

A. Yes.

Q. In other words, was it shortly after you got out of college?

A. No; thanks very much, but I have been out several years. I had been out several years.

Q. What school did you go to, sir?

A. Princeton, sir.

Q. Princeton?

A. Princeton, yes.

219 DONALD W. RIDDLE thereupon resumed the stand and testified further as follows:

Mr. Gertz: Let the record show that the witness Donald W. Riddle temporarily excused has resumed the stand.

Direct Examination (Continued) by Mr. Gertz.

Q. Dr. Riddle, do you receive any compensation for testifying or for other services in connection with this case?

A. I have no such understanding. The answer, so far as I know, is no.

220 Q. Now, where have you taught, when, and what subjects?

A. I began my teaching in 1922 in Kimball College in Salem, Oregon. In 1923 I taught at the University of Chicago. 1924 and 1925 I again taught at Kimball College in Salem, Oregon. From 1926 to 1942 I taught at the University of Chicago. From 1946 to the present I have taught at the University of Illinois, at the Navy Pier.

Q. In between you have been in military service?

A. I was in the army from 1942 to 1946.

Q. And what subjects did you teach during that period of time?

A. At Kimball College I had an imposing field. I was

professor of Biblical literature and languages. At the University of Chicago I taught New Testament history and literature. At the University of Illinois I have taught American history.

221 Q. What books and other writings have you published?

A. I have published, "Jesus and the Pharisees," "The Martyrs," "Early Christian Life," "Paul, a New Biography," "Studies in the Lectionary Text of the New Testament," "The Rockefeller-McCormick Manuscript," "The Gospels, their Origin and Growth," "Lincoln Runs for Congress." Those are the books—one other, "Early Christian Literature." Those are the books I have published. Two of them, "Studies in the Lectionary Text of the New Testament," and "Early Christian Literature" were with another author, a co-author.

Q. And you have an unpublished book of manuscript?

A. Yes, I have almost ready for publication a book, "Abraham Lincoln, Congressman." I have published numerous, I could only estimate, I should say, about forty articles of a scholarly nature.

Q. How many of them in the field of history?

A. None in the field of American history. All were in the field of the history of Christianity.

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222 Q. What is the extent of your familiarity with Lincoln literature, and the sources?

Mr. Martineau: Are you qualifying him as an expert on this subject? I just want to know what you are trying to get at.

Mr. Gertz: Yes.

The Witness: I have read all of the principal literature on Lincoln biography, and I have exhaustively worked the sources in the field of my personal specialization, that

particular problem of Lincoln's election to Congress and Lincoln's career in Congress.

* * * * *

225 Mr. Gertz: Q. Do you personally have an opinion as to the originality of the said two books?

* * * * *

226 The Witness: A. They appear to me to be highly original.

Mr. Martineau: I move it be stricken.

The Master: It may stand subject to your objection.

* * * * *

Mr. Gertz: I take exception to the ruling.

Q. Now, did you read the books on the death of Lincoln by Oldroyd, Laughlin and DeWitt?

A. What was the second one?

Q. Clara Laughlin.

A. I understood that to be Loughlin, L-o-u-g-h-l-i-n. Yes, I have read all three of those.

Q. And have you read other books on the assassina-
227 tion?

A. I think I would better say either no, or a general answer that I would not wish to specify others of the large number that I have read.

Mr. Martineau: He should be instructed to answer the question in as direct a manner as possible.

The Master: He should answer directly.

The Witness: Then the answer is no.

* * * * *

229 Mr. Gertz: Do the two Eisenschiml books mentioned differ from the earlier writings on the assassination?

Mr. Martineau: I object.

The Master: Sustained.

Mr. Gertz: They have raised an issue of the originality. Originality, in part, is a comparative matter, your Honor.

Mr. Martineau: That is not the way to prove it.

Mr. Gertz: They have raised the issue of originality. They denied the originality of these two books.

Mr. Martineau: That is not the way to prove it. He can prove it by the other books, but not by the conclusion of the witness.

The Master: What was that last question?

(Question read.)

Mr. Martineau: Just think what that opens.

230 The Master: Did you raise the question of the originality?

Mr. Gertz: We don't raise the question as to originality.

The Master: I pointed to him (indicating Mr. Martineau).

Mr. Martineau: They have raised, they allege in their complaint that it is original and we deny it.

The Master: Now he is being asked in his opinion if these are original books, or whether they are merely repetition as to other books heretofore written before these were published.

Mr. Reuben: He hasn't read all those books.

Mr. Martineau: He only read three.

Mr. Gertz: No, he read more, but he couldn't identify them.

The Master: From your reading, as much as you have read with reference to the death of Lincoln, have you an opinion as to whether these are original or whether they are comprehensive reaction of much that has gone before?

The Witness: I have that opinion, your Honor.

The Master: What is that opinion?

The Witness: They are highly original.

231 The Master: All right. I will let that stand.

Mr. Martineau: It is understood my objection stands?

The Master: Oh, yes.

Mr. Martineau: And I trust I hear no leading from across the table. When you see the cross-examination this is going to entail—

Mr. Gertz: You cross-examine in any way that is material. That is your privilege.

Mr. Martineau: I will settle down for a long session. You have opened up the doors.

Mr. Gertz: You do that. You have raised the issue. You should have admitted the originality, in my judgment.

Mr. Martineau: Let's not play games. Before we get through we will show it as not original in a copyright sense. Go ahead.

Mr. Gertz: Q. Did any author prior to Eisenschiml voice any suspicion that Lincoln's assassination was a northern plot?

A. No.

Q. Did any author prior to Eisenschiml voice any suspicion that Stanton and the radicals stood to profit by Lincoln's death?

232 Mr. Martineau: It is understood my objection goes to this whole line?

Mr. Gertz: Oh, yes.

The Master: Let the record show your objection goes to this entire line.

Mr. Gertz: Q. Prior to the publication of the said two Eisenschiml books, was the story of John F. Parker ever told?

A. No.

Q. Did any author prior to Eisenschiml state that there were more than four persons in the box at Ford's Theatre?

A. No.

Q. Prior to the publication of Eisenschiml's books, did

anyone state that Miss Harris and Major Rathbone made their divergent statements?

A. No.

Q. Or what the significance of such divergent statements was?

A. No.

Q. Prior to the publication of the Eisenschiml books, did anyone ever state that Forbes had made a statement about his whereabouts on the evening of the assassination?

233 A. No.

Q. Prior to the publication of the Eisenschiml books, did anyone state that Stanton had perjured himself as to Lincoln's last visit to the War Department?

Mr. Martineau: May I call the attention of the Court that these questions are highly leading? They certainly suggest the answer which is desired.

Mr. Gertz: No, it is yes or no. How could it be a simpler way of stating it?

The Master: I am letting him answer all subject to your objection.

Mr. Gertz: There is no objection as to form?

Mr. Martineau: I just made an objection as to form.

The Master: He just made it.

Mr. Gertz: That is right.

The Master: I will let the answer stand subject to the objection.

Mr. Gertz: Q. Prior to the publication of the Eisenschiml books, did any author state what Stanton and Eckert did on the night of the assassination?

A. No.

Q. What their excuses were?

A. No.

Q. Or that the excuses were untrue?

234 A. No.

Q. Prior to the publication of the Eisenschiml books, did any author state that the War Department knew the identity of the conspirators for several weeks previously?

A. No.

Q. Prior to the publication of the Eisenschiml books did any author point out that Grant's excuse for not attending the Ford Theatre with the Lincolns was a sham?

A. No.

Q. Prior to the publication of the Eisenschiml books did anyone point out that Grant could have seen his children almost as early by taking a morning train as by taking the train he did?

A. No.

Q. Prior to the publication of the Eisenschiml books did any author give any timetable of railroads with respect to the Grant journey?

A. No.

Q. Prior to the publication of the Eisenschiml books did any other point out that Stanton willfully withheld the news of the assassination?

A. No.

235 Q. Or why he witheld such news?

A. No.

Q. Prior to the publication of the Eisenschiml books, did any author point out that Gobright acted peculiarly by killing one of his own wires to his newspaper?

A. No.

Q. Prior to the publication of the Eisenschiml books did any author point out that the news of the assassination was released too late for the morning editions of newspapers to print it?

A. No.

Q. Prior to the publication of the Eisenschiml books did any author point out that none of the Washington papers printed the name of the assassin?

A. No.

Q. Prior to the publication of the Eisenschiml books did any author point out that the Richmond and other southern newspapers did not get the news of Booth's connection with the assassination until Booth presumably had passed by?

A. No.

Q. Prior to the publication of the Eisenschiml books did any author point out that the interruption of the
236 wire service must have been an inside job?

A. No.

Q. Prior to the publication of the Eisenschiml books did any author point out that the pursuit was misdirected so that Booth's problem of escape route remained unpatroled?

A. No.

Q. Prior to the publication of the Eisenschiml books did any author point out that Pittman deliberately mutilated the official report of the trial?

A. No.

Q. Prior to the publication of the Eisenschiml books did anyone ever point out the peculiarity of the clews left in Atzrodt's room?

A. No.

Q. Prior to the publication of the Eisenschiml books did any author point out Gleason's part in the story?

A. No.

Q. Prior to the publication of the Eisenschiml books was it known that O'Beirne had left a diary?

A. No.

Q. Or other papers?

A. No.

Q. Prior to the publication of the Eisenschiml
237 books did any author point out the advertisements about Lincoln's visit to Ford's Theatre?

A. No.

Q. Was Harrison's story ever published prior to Eisenschiml's books in any account of the assassination?

A. No.

Q. Prior to the publication of the Eisenschiml books did anyone ever before wonder why Parker, Forbes and Hanscom were not questioned at the conspiracy trial?

A. No.

Q. Prior to the publication of the Eisenschiml books did anyone ever speculate as to why Cox, Jones, Jett, Bainbridge and Ruggles were not punished?

A. No.

Q. Prior to the publication of the Eisenschiml books, did anyone point out that Stanton and Parker were dismissed at approximately the same time?

A. No.

Q. Prior to the publication of the Eisenschiml books did anyone ever mention the blotter at the Tenth Street Police Station in Washington?

238 A. No.

Q. Prior to the publication of the Eisenschiml books did anyone ever find out that the assassination shot was fired at 10:13 p. m.?

A. No.

Q. I show you Exhibit C attached to Plaintiff's Exhibit 7, and ask you to examine it.

Mr. Martineau: While he is looking at that, may I make it clear in the record yesterday when I had made no objection to the admission of the exhibit, which is an affidavit in support of the motion for summary judgment, I wasn't, of course, admitting the truth of the statements made in it.

Mr. Gertz: Of course not.

Mr. Martineau: That is understood.

Mr. Gertz: You are not admitting the truth of anything. But you have no other kind of objection?

Mr. Martineau: No.

Mr. Gertz: You are not admitting to the truth or the credibility of the witness.

Mr. Martineau: In other words, I have no other objection. I don't want to be bound, but it has a—

Mr. Gertz: Or implication. I understand, sir.

* * * * * *

239 Mr. Martineau: Let me understand this. He has some parallel columns?

The Witness: I have nothing with me, Mr. Gertz.

Mr. Gertz: I know, not with you. But I understand from Mr. Martineau you are going to be on the stand for quite a while in cross-examination, so I expect you will come back again, and when you come back, will you have with you the parallel columns, because I have some questions I would like to ask you.

Mr. Martineau: Do you have some?

The Witness: I am sorry. I would have to go back 240 to my office, because I have nothing with me.

Mr. Gertz: That is perfectly all right, because Mr. Martineau is going to have some extensive examination.

Mr. Martineau: That is going to depend on the answers.

* * * * * *

242 DONALD W. RIDDLE thereupon resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Mr. Gertz: Do you want to go ahead with your cross-examination?

Cross-Examination (Continued) by Mr. Martineau.

* * * * *

244 Q. I am just wondering how you prepared those parallel columns.

A. No. I compared, but I did not mark my copies of Dr. Eisenschiml's books.

Q. I see. So that your copies are in their pristine and virginal state as far as markings are concerned?

A. Yes.

Q. In other words, I suppose your method was just to either write on paper the quote from Dr. Eisenschiml and then later have it transcribed into those parallel columns?

A. No. What I did was to check in the margin of the Millard article the page reference to the Eisenschiml books. Then when I received a copy of what I now clearly understand is Exhibit C—

Q. To Exhibit 7.

A. Yes.

Q. Yes.

A. Then I used that with the copy of the Millard which I had already begun to annotate.

* * * * *

252 Q. And Mr. Gertz did not tell you, I presume, that he had already prepared some parallel columns of a similar nature?

A. No.

Q. You are sure he didn't say a word about that?

A. No, he gave me a set of the parallel columns later, but before he made no reference to anything that he had done.

Q. I see. You are quite sure of that, are you?

A. Yes.

Q. And nothing was said about compensating you for your time in this work?

A. Nothing.

Q. And you expect no compensation at all?

A. None.

Q. You do, however, appear as a voluntary witness without a subpoena, I take it?

A. Yes.

Q. Had you and Dr. Eisenschiml been friends for a long time, Dr. Riddle?

253 A. I met Dr. Eisenschiml in 1948. We were both members of the Civil War Round Table, and perhaps two or three times a year met on those occasions.

Q. Well, I mean, would you regard him as a good friend of yours?

A. I hope so. I hope he so regards me. I regard him as a friend.

Q. And you would like to see him win this lawsuit?

A. Oh, naturally.

Q. Mr. Gertz is likewise a close friend of yours?

A. Less so than Dr. Eisenschiml, but I have seen him similarly at the Civil War Round Table, and I also regard him as my friend.

Q. Now, let me ask you in preparing these parallel columns of what you conceive to be similarities—I think that states it fairly, doesn't it?

A. Similarities.

Q. Yes. Did you also prepare any columns of differences?

A. No.

Q. Either factual or differences in style?

A. No.

Q. You were just interested in proving, picking out of these rather voluminous books, similarities?

254 A. True.

Q. Mr. Gertz didn't suggest to you that you also show any differences of either factual statements or treatment?

A. Mr. Gertz said nothing.

Q. I see. Well, now, in your long, vast experience as a scholar and historian, didn't it occur to you that it might give a fairer picture of the situation if you likewise set forth differences as well as likenesses?

A. No, it did not.

Q. You are acquainted with John Stuart Mills "Law of Agreements and Differences," I suppose?

A. Sir, I would have to say that I may have read that, but I cannot certify that I have.

Q. Can we agree, then, that in any case, that you don't apply that law in your scholarly pursuits?

Mr. Gertz: Objection to that. He said he didn't know if he read it or not.

The Master: He may answer that.

Mr. Martineau: Q. Can you answer?

A. I just don't know how to answer. I don't know the law, I can't say whether I do not apply it.

* * * * *

255 Q. As I understand it, in your testimony about these 85 alleged parallelisms that you pointed out yesterday, you didn't go beyond the four corners of the conflicting works, if I may call it that, did you? That is to say, the Millard work plus Dr. Eisenschiml, you confined yourself to the four corners of those three different works?

A. Yes.

Q. For example, you did not examine any of Dr. Eisenschiml's sources, I believe, did you?

A. No.

Q. Therefore, you are unable to state whether or not Dr. Eisenschiml very closely paralleled some of his sources?

A. Dr. Eisenschiml—

Q. Do you know whether that is true?

A. —quoted some of his sources.

256 Q. Did you set those up? Would that be a parallelism, then, between Dr. Eisenschiml and his source?

A. To the extent that Dr. Eisenschiml cites the source, yes.

Q. Now, let's take the ones that Dr. Eisenschiml did not cite in the text, and he does, of course, we can all agree, cite several in his text. Let's take the ones where he just cites an authority for a statement.

A. Yes.

Q. Did you take the trouble to read those authorities?

A. No.

* * * * *

257 Q. In the instances, Dr. Riddle, where Dr. Eisenschiml doesn't quite, let us say, in haec verba in his two books—

A. Yes, I understand that.

Q. So that you could see right then and there that he was quoting, take the other instances where he just cites an authority. Now, in those instances, since you did not read those authorities, you were unable to state whether or not he, Dr. Eisenschiml, did not closely parallel in verbiage his own sources in some cases?

A. My assumption would be that he paralleled them closely.

Q. Yes. So that it would be conceivable, I presume, to take these parallel charts you have prepared and have

Millard in one column, Dr. Eisenschiml in another, and the common source in a third, would it not?

A. Yes.

* * * * *

264 Q. By the way, among your many attainments, did you ever teach English, too?

A. No.

Q. You are not an expert in the use of the English language, I assume?

A. No, no.

Q. Are you an expert in semantics?

A. No.

Q. The science of meaning, as it has now come to be called?

A. No. No.

* * * * *

268 Mr. Martineau: Q. I call your attention to page 14 of Dr. Eisenschiml's work, "Why Was Lincoln Murdered?" and I will ask you if that same letter isn't set up in haec verba?

A. It is.

Q. Now, is it your view as a historian that after Dr. Eisenschiml's book was published that it did not become an original source as to the fact therein stated?

A. It did not become an original source.

Q. You have answered.

A. In any respect.

Q. You have answered, sir. And so you want the Court to believe that this proves to you beyond peradventure
269 of a doubt that Millard copied from Eisenschiml?

A. Yes.

Q. Have you ever read Carl Sandburg's book?

A. Yes.

Q. Isn't it a fact that that same letter appears in haec verba in Carl Sandburg's book, Volume 4, Page 273?

A. It is a fact that it appears--

Q. Just answer yes or no.

A. —with acknowledgment of Mr. Eisenschiml's source.

Q. Just answer yes or no and we will get to the other. Does it not appear?

A. It does.

Q. Now, maybe you can tell me where there is an acknowledgment of Dr. Eisenschiml as the source?

A. In the introduction.

Q. I want you to point out to the Court, sir—

Mr. Gertz: He just stated, in the introduction.

Mr. Martineau: Q. I want you to point out to the Court where this very letter is credited to Dr. Eisenschiml.

A. It is not.

* * * * *

271 Mr. Martineau: Q. Now, have you exhausted your recollection, sir, as to any other instances which you can point out to us which lead you, in your opinion as a literary expert or a historical expert, to the conclusion that Joseph Millard copied Eisenschiml rather than original sources possibly used by both?

A. In particular the 13 instances of extensive
272 identical reference are sufficient to convince me of that direct copying.

* * * * *

278 Mr. Martineau: Q. And I will now read, and I trust that I will not misquote:

"In crossing over to the War Department we passed some drunken men. Possibly their violence suggested the thought to the President. After we had passed them Mr. Lincoln said to me, 'Crook, do you know I believe there are men who want to take my life.' Then after a pause, he said half to himself, 'And I have no doubt they will do it.'"

Now, do you still say that Joseph Millard copied from Eisenschiml instead of Crook?

A. That is my conclusion.

Q. You have answered, sir. You were drawing, reading down the line of the 13—

A. No, sir, I didn't propose to go down the line of the 13. I proposed to pick out these examples. You picked out this one.

Q. My question was, I wanted you to pick out every example that you say proves to you that Millard copied from Eisenschiml and didn't go to the original source?

279 A. In that case, sir, the only thing to do is go down the list of 13. My point is—

Q. That is exactly what I asked you to do, sir.

A. The presumption—

Q. That is precisely what I asked you to do.

A. It establishes a probability. Very well, I will do it if that if what is what you want.

Q. That is exactly what I want. I want the truth if I can get it.

Mr. Gertz: Jack, bear in mind that in ten minutes this witness has to leave.

Mr. Martineau: Okay.

The Witness: Page 106, column 1:

"I have perfect confidence in those who are around me."

The Master: What are you reading from now, please?

The Witness: Millard, your Honor, page 106, column 1.

The Master: What page?

The Witness: Page 106.

Mr. Martineau: 106, column 1.

The Witness: Shall I repeat, your Honor?

"I have perfect confidence in those who are around me. I know no one could do it and escape alive. But if it

280 is to be done, it is impossible to prevent it."

Mr. Martineau: Q. That is Millard?

A. That is Millard.

Q. What does Eisenschiml say?

A. The reference in Plaintiff's Exhibit 1 is page 44:

"I have perfect confidence in those who are around me. I know no one could do it and escape alive. But if it is to be done, it is impossible to prevent it."

Q. What does Eisenschiml cite for that?

A. Reference, "Crook, Through Five Administrations, page 66."

Q. Will you now please read "Crook, Through Five Administrations," page 66, to his Honor, and read this part, right down here (indicating), after the sentence, "We walked a few paces in silence," and please read it with feeling.

A. "Then he said in a more ordinary tone, 'I have perfect confidence in those who are around me—in every one of you men. I know no one could do it and escape alive, but if it is to be done it is impossible to prevent it.'"

Q. Now, do you still say that the part you cited proves to you that Millard copied from Eisenschiml 281 rather than going to the original source, Crook?

A. I do.

Q. All right.

A. The next instance is also on Millard, page 106—

Q. Before you get to that, Doctor, may I ask you this—

A. Yes.

Q. Prior to the time when you just read this in Crook you had never seen this book before, had you?

A. Crook?

Q. Crook.

A. Not to my knowledge.

* * * * *

Q. Let's carry on with the reading.

The Master: The reading, I think, will save a lot of time, Doctor.

The Witness: The paragraph in Millard beginning with "I am thinking":

282 "I am thinking he would be the kind of man to go with me this evening. May I take him?"

Plaintiff's Exhibit 1, page 32:

"I am thinking he would be the kind of man to go with me this evening. May I take him?"

Mr. Martineau: Q. What does Eisenschiml cite for that?

A. "David Homer Bates, "Lincoln In The Telegraph Office, Century Co., D. Appleton-Century Co., New York, 1907, page 367."

Mr. Martineau: Which one of the item numbers was it, do you know, Ehner?

Mr. Gertz: I will have to look at that again.

(Discussion off the record.)

Mr. Martineau: Q. Dr. Riddle, I don't have Bates' book with me, but that appears to you as a scholar to be a direct quotation by Dr. Eisenschiml from Bates, doesn't it?

A. Yes.

Q. And that would indicate to you that Bates had cited that very thing in haec verba, would it not?

A. Yes.

Q. So does that indicate to you that Millard went to Eisenschiml, lifted it from Eisenschiml instead of going to the original source, Bates?

283 A. Yes.

Q. It still does?

A. Yes.

284 OTTO EISENSCHIML, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

285 Q. Of what nation are you now a citizen?

A. United States.

Mr. Martineau: That is objectionable. That is not the way to prove citizenship.

The Master: Is there any question about him being a citizen of the United States?

Mr. Martineau: Yes. He alleges that he is and we don't admit it, and that is not the proper way to prove it.

The Master: No, merely for somebody to say "Yes, I am" doesn't prove citizenship.

Mr. Martineau: No. Not that we think any the less of him for it.

Mr. Gertz: Jack, in connection with the State Department letter, are you going to take exception to the fact that it is a photostat?

Mr. Martineau: No, not that it is a photostat, but
286 just that it is a piece of hearsay and is not admissible in evidence.

Mr. Gertz: Mark this document as the next exhibit number, Exhibit 17.

(The document above referred to was marked Plaintiff's Exhibit 17 for identification.)

Mr. Gertz: Q. I show you a document marked for identification as Plaintiff's Exhibit 17 and ask you to examine it.

A. Yes, sir.

Q. Is that a true and correct photostatic copy of an original letter from the Department of State now in your possession?

A. Yes, it is.

Mr. Martineau: No objection on the ground that it is a photostat.

Mr. Gertz: I will offer the said letter in evidence.

Mr. Martineau: I object most strenuously to it.

Mr. Gertz: Maybe the Court better read it.

Mr. Martineau: It is not the proper way to prove citizenship and it is hearsay.

The Master: Of course, this isn't the proper way
287 to prove it, but you have got a lot of records to bring in in order to establish that.

Mr. Gertz: It is just too bad that we have to on that point.

The Master: I will have to sustain the objection.

Mr. Martineau: You can always eliminate the trouble by dismissing your lawsuit.

The Master: That would be a very simple solution, wouldn't it?

Mr. Gertz: Oh, yes.

Q. Do you have personal knowledge as to what nation, if any, your father was a citizen of at the time of your birth?

Mr. Martineau: I object to that. It is obviously hearsay. How could he know at the time of his birth?

The Master: At the time of his birth he could hardly know very much about what his father's citizenship was. I am quite sure I didn't know mine at the time of my birth.

Mr. Gertz: Q. Do you have personal knowledge as to the nation of which your father was a citizen?

Mr. Martineau: I object to that. That is obviously hearsay.

The Master: Sustained.

288 Mr. Gertz: Well, if we have to, Jack, I am going to ask for the record that the defendant admit the citizenship of the plaintiff. In the absence of such admission, that the costs of proving the same be charged against

the defendant. I would like to state for the record that I made that request of the defendant some weeks or months before the trial began.

Mr. Martineau: And we respectfully declined the request. I don't see why we should have to dig up this man's citizenship.

The Master: No, that is your burden, it is not his burden.

Mr. Gertz: Then we will prove it, but I am nonetheless stating for the record, and you will admit that some months ago I made the same request?

Mr. Martineau: I will indeed, I will proclaim it.

Mr. Gertz: And so that I am now stating for the record that the costs connected with proving this fact that we properly ask them to admit should be borne by them.

The Master: You may state that for the record.

Mr. Martineau: You are stating it and we state the contrary, and the Court will decide.

Mr. Gertz: That is right, but I want to state it for
289 the record.

The Master: That simplifies it.

Now you can go on with your examination subject to your bringing in proof as to his citizenship.

Mr. Gertz: Yes.

* * * * *

291 Mr. Martineau: Your Honor, may the record show that Dr. Eisenschiml is apparently, in answer to these questions, reading from a paper? I have no objection to it. I just wish the record to show it.

Mr. Gertz: Doctor, will you take it away so there won't be any question—

292 The Master: The record may show it.

* * * * *

Q. Have you read any of your answers?

A. I just checked myself so I wouldn't omit anything.

* * * * *

Mr. Gertz: I don't want the impression to be had that he is actually reading something. He hasn't
293 been.

Mr. Martineau: I just saw his eyes drop down—

Mr. Gertz: Now and then he apparently did to check up on a source.

* * * * *

Mr. Martineau: May I call your attention to this, Elmer. The original question to the doctor was, what books on Lincoln's death have been published, and then the doctor gave an answer in which he said the ones he considered important and he named these. Now, I am just wondering, are you trying to get the others?

Mr. Gertz: Yes.

Q. What others are there, irrespective of those you considered important?

A. None.

Q. That deal exclusively with it?

294 A. Exclusively, yes.

Q. But there are some that have a lot of material on the subject?

A. I may correct this to a certain extent. Some pamphlets that call themselves books and are sometimes quoted as books, like Abbott, are no books in my sense of the word. They are simply newspaper reports pasted together more or less.

Mr. Martineau: Publications, but not books.

Mr. Gertz: Q. Have you read all of those books mentioned by you?

A. So far as I know, I have.

Q. In what respects, if any, do your two books, Plaintiff's Exhibits 1 and 2, differ from those books?

Mr. Martineau: Oh, please.

Mr. Gertz: Well, you placed a question of originality into issue in this case.

Mr. Reuben: It doesn't mean you can prove it by hearsay.

Mr. Gertz: And originality—

Mr. Martineau: This can go on forever.

Judge, just think of that question.

Mr. Gertz: You placed the original question of originality in issue.

295 Mr. Martineau: But that is not the way to prove it.

Mr. Gertz: If you will admit originality—

Mr. Martineau: I will admit no such thing, but that is not the way to prove it.

Mr. Gertz: You suggest a way to prove originality. You suggest any other way of proving originality; as to the respects in which it is different from other books.

The Master: If he answered that question that you have asked we would be here until—

Mr. Gertz: I am not intimidated by that kind of statement. Originality consists of differences—

The Master: Read the question and then see what we have got.

(Question read.)

The Master: Well, subject to the objection I will let him answer and we will see what we get.

The Witness: My books differ fundamentally from the previous books. The previous books which I have mentioned are recitals of then known facts. They give a consecutive story of the assassination. I am sidestepping all things that can possibly be eliminated from the known facts as repetitions. I have to put in a skeleton to hold the story together, and then I introduce new evidence

296 that has come to my notice, not contained in previous publications.

Mr. Martineau: Have you finished with your answer, Doctor?

The Witness: Yes.

Mr. Martineau: I move to strike the answer as being one of the most astounding conclusions of a witness that I have ever heard in my life.

The Master: It certainly is. I will let it stand subject to the objection, but counsel is right.

Mr. Gertz: Q. Is there anything besides new evidence in your books?

A. No.

Mr. Martineau: I object to that. I object to that.

Mr. Reuben: We will be here forever.

The Master: These are very broad questions.

Mr. Martineau: Besides, the books are the best evidence.

The Master: The books, of course, are.

Mr. Gertz: The books are in evidence now.

Mr. Martineau: If they are in evidence you don't need them.

Mr. Gertz: But the other books aren't in evidence.

Mr. Reuben: Put them in.

297 Mr. Martineau: Put them in.

Mr. Gertz: Isn't that silly, that I am going to pile up a record? We are talking about good faith—

* * * * *

307 Mr. Gertz: Q. From what source did you derive the information contained in Plaintiff's Exhibit 18 for identification?

A. From memory.

Q. Did you believe your memory to be accurate?

A. No, I do not.

* * * * *

311 Mr. Gertz: Q. Did any author prior to the publication of your books voice any suspicion that Lincoln's assassination was a Northern plot?

Mr. Martineau: I object to this as calling for a vas conclusion on the part of the witness.

Mr. Gertz: He can cross-examine him on it.

The Master: Well, of course he can cross-examine on everything, but I think that is—

Mr. Gertz: In reference to the article, your Honor. I think we ought to have a discussion of the issues because that is the basic issue of the case.

The Master: Read the question.

Mr. Martineau: What is a Northern plot?

Mr. Gertz: I think at this point, since there is a whole series of questions like this, we ought to discuss the issues of the case. These are very much issues of the case.

The Master: I will let him answer subject to the objection.

The Witness: Not to my knowledge.

The Master: All right.

Mr. Gertz: Q. Did any author prior to the publication of your said books state that Stanton and the 312 radicals stood to profit by Lincoln's death?

A. Not to my knowledge.

Mr. Martineau: I don't want to butt in all the time, but is it understood that my objection runs to this whole series of questions?

The Master: Yes.

Mr. Gertz: To the whole line. Many of these questions are the same questions that have been put to Dr. Riddle.

Mr. Martineau: Yes. I don't want to interrupt.

Mr. Gertz: No, it is perfectly all right, because at one stage or another we will have to argue a lot of things and we might as well argue them later and not interrupt with argument now.

The Master: Proceed.

Mr. Gertz: Q. Prior to the publication of your book "Why Was Lincoln Murdered" did any author ever give the story of John F. Parker?

A. Not to my knowledge.

Q. Prior to the publication of Plaintiff's Exhibit 1 did any author ever state that there were more than four persons in the box at Ford's Theatre?

A. No.

Q. Prior to the publication of your said book did
313 anyone ever state that "Miss Harris and Major Rathbone made divergent statements?"

A. No, not to my knowledge.

Q. Or what the significance of such divergent statements was?

A. No.

Q. Prior to the publication of your said book did any author ever state that Forbes had made a statement about his whereabouts on the evening of the assassination?

A. Not to my knowledge.

Q. Prior to the publication of your said book did any author state that Stanton had perjured himself as to Lincoln's last visit to the War Department?

A. Not to my knowledge.

Q. Prior to the publication of your said book did any author ever state what Stanton and Eckert did on the night of the assassination?

A. No, not to my knowledge.

Q. Or state that their excuses were a sham?

A. No, sir.

Q. Prior to the publication of your said book did any author state that the War Department knew the iden-
314 tity of the conspirators for several weeks previously?

A. Not to my knowledge.

Q. Prior to the publication of your said book did any author ever point out that General Grant's excuse for not going with the Lincolns to Ford Theatre was a sham?

A. No, not to my knowledge.

Q. Prior to the publication of your said book did any author ever state that Grant could have seen his children almost as early by taking a morning train?

A. No, not to my knowledge.

Q. Prior to the publication of your said book did any timetable in connection with Grant's said trip ever appear?

A. No.

Q. Prior to the publication of your said book did any author ever state that Stanton wilfully withheld the news of the assassination?

A. Not to my knowledge.

Q. Or why he withheld the news?

A. Not to my knowledge.

Q. Prior to the publication of your said book did any author ever state that Gobright acted peculiarly by killing one of his own wires or dispatches?

315 A. Not to my knowledge.

Q. Prior to the publication of your book did any author state that the news of the assassination was released too late for the early morning editions of newspapers to print it?

A. No, not that I know of.

Q. Prior to the publication of your said book did any book state that the Washington papers did not dare print the name of the assassin?

A. Not to my knowledge.

Mr. Gertz: Will you read that last one?

(Question and answer read.)

Q. Prior to the publication of your book did any other author state that the Washington papers did not dare print the name of the assassin?

A. Not that I know of.

Q. Prior to the publication of your said book did any author state that the Richmond and other Southern newspapers did not get the news of the assassination until Booth presumably had passed by?

A. No.

Q. Prior to the publication of your said book did any-

one state that the interruption of the wire service must have been an inside job?

316 A. Not that I know of.

Q. Or was part of a plan?

A. Not that I know of.

Q. Prior to the publication of your said book did anyone ever state that the pursuit was misdirected so that Booth's probable escape route remained unpatrolled?

A. To my best knowledge, no.

Q. Prior to the publication of your said book did anyone ever state that Pitman deliberately mutilated the official report of the trial?

A. Not to my knowledge.

Q. Prior to the publication of your said book did anyone ever point out the peculiarity of the clues left in Atzerodt's room?

A. Not that I know of.

Q. Or prior to the publication of your said book did anyone point out Gleason's part in the story?

A. Point out what?

Q. Gleason's part in the story?

A. I still don't get it, what part of the story?

Q. Gleason's part of the story.

A. Oh, Gleason. No, I don't think so. To the best of by knowledge the answer is no.

317 Mr. Martineau: Gleason's part in what?

Mr. Gertz: The story of the assassination and the pursuit of the assassins, of the conspirators, one assassin and a number of conspirators.

Q. Prior to the publication of your said book was it known that O'Beirne had left a diary?

A. To my best knowledge, no.

Q. Or that he had left other papers?

A. No.

Excuse me, with the exception of those who had the papers.

Mr. Martineau: You said any other book, though, didn't you?

Mr. Gertz: Read the question again, will you, please?

(The record was read.)

Mr. Gertz: All right.

Q. At the time of the publication of your said book who owned the O'Beirne diary and papers?

A. That I did.

Q. Had any portion of the O'Beirne diary and papers been published at any time before portions appeared in your said books?

A. To my best of knowledge, no.

318 Q. Had Mrs. Lincoln's letter to O'Beirne with respect to the hiring of Parker ever appear anywhere prior—

A. Never, no.

Q. That was part of O'Beirne papers purchased and owned by you?

A. That is correct.

Q. Would you state what the O'Beirne papers consist of? Give a general description of the O'Beirne papers and diary.

A. The O'Beirne papers consisted partially of his own recollections as Provost Marshal of the District of Columbia, and a portion of it pertained to the pursuit of Booth. He was anxious to get a large part of it—

Q. Let me interrupt. I only want what the papers consist of, a sort of inventory, and not any comments with respect to it.

Mr. Martineau: Physical inventory.

Mr. Gertz: Q. ~~Phy~~sical inventory.

A. Copies of the application for a portion of the reward and substantiation of his claim.

Mr. Martineau: Sort of a brief, I suppose.

Mr. Gertz: Yes.

319 Q. Do you recall the size of that collection of papers, to the best of your recollection?

A. I would say there were between fifty and seventy-five different documents.

Q. Prior to the publication of your said book did the advertisements that appeared in the Washington Star prior to the assassination appear anywhere else?

A. Not that I ever saw.

Mr. Martineau: Is that in regard to Lincoln's appearance that night at Ford's Theatre?

The Witness: Yes.

Mr. Gertz: Yes.

Q. Prior to the publication of your said book was Harris' story ever published?

A. Was whose?

Q. Harris' story, giving his account of the assassination.

A. Harris?

Q. Harris.

Mr. Martineau: Harris or Harrison?

Mr. Gertz: My note is Harrison, but I recall it as Harris. I have it down here as Harrison.

The Witness: General Harris, who was one of the judges at the trial? Is that the man?

320 Mr. Gertz: Q. That is one of those.

A. Yes,—no, they were published much later.

Q. Much later than your book?

A. No, later than the—excuse me, my recollection is that they were published in 1892.

Mr. Martineau: What is the question?

Mr. Gertz: Will you read it?

(Question read.)

Mr. Gertz: And he indicated the answer.

Mr. Martineau: And the answer was, I think, Doctor, that your recollection was that it was published before?

The Witness: I think 1892.

Mr. Gertz: Q. Prior to the publication of your said book did anyone ever speculate as to why Parker, Forbes and Hanscom were not questioned?

A. I have never seen it.

Q. Prior to the publication of your said book did anyone ever speculate as to why C x, Jones, Jett, Brainbridge and Ruggles were not punished?

A. Not to my knowledge.

Q. Prior to the publication of your said book did anyone ever point out that Stanton and Parker were dismissed at about the same time?

321 A. Not that I know of.

Q. Prior to the publication of your said book did anyone ever point out the existence of the blotter at the Tenth Street Police Station?

A. For publication purposes, not.

Q. Prior to the publication of your said book did any account of the assassination refer to premature reports of Lincoln's death?

A. Not that I know of.

Q. Prior to the publication of your said book did anyone ever point out the shot that killed Lincoln was fired at 10:13 p. m.?

A. I never saw that time mentioned.

Q. To what extent—

Mr. Martineau: Is that all the priors—

Mr. Gertz: At this moment, yes.

Q. To what extent and in what manner, if at all, did the Millard article, Plaintiff's Exhibit 3, follow the outline or the plan or the pattern or the sequence of your two books, Plaintiff's Exhibits 1 and 2?

Mr. Martineau: Oh, I object to this. The books are all in evidence. The Court is quite capable or determining for itself. This goes to the very heart of this case.

322 The Master: The books are certainly the best evidence.

Mr. Martineau: They certainly are.

* * * * *

325 The Witness: This is a story, now, of the general buildup and the pattern showing the parallelism between my two books which have to be taken together for this particular elucidation and Millard's article.

In the very beginning of "In The Shadow of Lincoln's Death," Chapter 2, I refer to the premature rumors and publications of Lincoln's death, of his trip to Manchester, of the report in the Rhonish town of St. Joseph, Minnesota, of the Newburgh Journal and the Middletown Whig Press. He also has that in the beginning of his article.

From now on I am going to stick to "Why Was Lincoln Murdered" because that is the main bone of contention.

* * * * *

328 Mr. Gertz: Q. I show you the document marked for identification as Plaintiff's Exhibit 20 and ask you to examine it. Have you seen that before?

A. Yes, sir.

Q. Who prepared that?

A. I did.

Q. Entirely?

A. Entirely.

The Master: Consisting of how many pages?

Mr. Gertz: Consisting of 21 pages.

The Master: All right.

Mr. Martineau: When, how recently was it prepared?

Mr. Gertz: Q. When did you prepare that, Doctor?

A. I would say within the last four weeks.

May I start?

Mr. Martineau: Just let me make it clear, with the understanding then that I am not waiving my objection to this line of testimony by the doctor—

Mr. Gertz: That is right.

Mr. Martineau: I am saving my record, and let him go ahead.

329 Mr. Gertz: Yes, let's see, for the purposes, then, of this case I am going to offer the said document in evidence as Plaintiff's Exhibit 20.

The Master: It may be received with the ame objection.

Mr. Martineau: The same objection, yes, and with the additional objection that I think it is a little premature until we see what it is when the doctor goes ahead with it.

Mr. Gertz: Subject to your right to cross examine and subject to your objections to the general line of explanations.

The Witness: Overall Plagiarism of Millard's Story.

Mr. Gertz: Wait, we are not asking you to read it, I understand. You don't want it read.

The Witness. Yes, I do. It is much faster than if I skip. I will read gast.

Mr. Gertz: This is in response to the question that he was asked with respect to the extent and manner, if any, that the Millard article followed the outline or the plan or the pattern or the sequence of his two books.

Mr. Martineau: In other words, he now wants to read this Plaintiff's Exhibit 20.

330 Mr. Gertz: Yes.

Mr. Martineau: In response to the question.

Mr. Gertz: In answer to that particular question.

Mr. Martineau: Subject to my objection—

The Master: Subject to your objection.

* * * * * *

347 Mr. Gertz: The rest of it is some argumentation and a summary of some evidence.

The Witness: Yes.

Mr. Gertz: But what I will do, Jack, is to give you a copy.

This document was admitted subject to your objection.

* * * * * *

350 Mr. Martineau: May I say this, Elmer, as to number 21 and number 22, I certainly don't object, there is no question as to their genuineness, and so forth, but as to their materiality at this time I would like to just reserve my objection.

Mr. Gertz: If you want to argue it later.

The Master: All right.

* * * * * *

351 Mr. Gertz: I offer in evidence as Plaintiff's Exhibit 23, the assignment of the copyright of "In The Shadow of Lincoln's Death" from the original copyright holder to Otto Eisenschiml, the publisher who originally held the copyright.

Mr. Martineau: I don't dispute the genuineness of it, but I make the same objection.

The Master: Received subject to your objection.

* * * * * *

Mr. Gertz: Now, Jack, would you admit that the document for identification as Plaintiff's Exhibit 24 is a true and correct carbon copy of a letter, the original of 352 which was received by Fawcett Publication?

Mr. Martineau: Subject to checking it against the purported original.

Mr. Gertz: Yes.

Mr. Martineau: And subject to my very serious objection as to its materiality, which I will express with all the vigor at my command.

Mr. Gertz: Yes.

Mr. Reuben: May I see it?

Mr. Gertz: Surely. I offer it in evidence as Plaintiff's Exhibit 24.

* * * * * *

The Master: Subject to the objection, it may be
353 received.

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Mr. Gertz: I am offering the cover only and not the contents of the January, 1954 issue of True with Plaintiff's Exhibit 25. That is the document heretofore marked for identification as Plaintiff's Exhibit 4 in connection with the deposition of March 26, 1954.

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Mr Martineau: Of course, I object to the materiality, not to the genuineness.

The Master: All right, subject to the objection, it will be admitted.

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354 Mr. Gertz: Now I ask the Master and the Court to take judicial notice and the defendant to admit that the President of the United States has issued proclamations pursuant to the Copyright Act as amended, extending to subjects of Austria the privilege of securing copyright.

Mr. Martineau: If that is the case, I just wouldn't dispute your word.

Mr. Gertz: Yes.

The Master: O.K.

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361 DONALD W. RIDDLE, called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Martineau.

Q. Dr. Riddle, did you think to bring with you today those parallel columns?

A. Yes, I have them. I suppose I might as well ask now for the copy of the exhibit which I myself underlined, and for the copies of Exhibits 1 and 2.

Mr. Gertz: Yes.

The Witness: I presume they will be needed.

Mr. Gertz: Yes. May the record show I am now handing to the witness Plaintiff's Exhibit 15, and Plaintiff's Exhibits 1 and 2. Those are the two books.

The Witness: And the other single sheet of my notes.

Mr. Gertz: I have got that.

The Witness: Is that 16?

Mr. Gertz: 16 for identification. I don't think I have offered it in evidence.

The Witness: They may be useful, I don't know.

Mr. Martineau: Q. Doctor, could you describe, just so we get everything shipshape in the record—

A. Yes.

362 Q. —your document which you have produced in response to my request, your parallel columns is this thing consisting of—do you know how many pages?

A. No, I haven't counted the pages. I think it is 64 numbered items.

Mr. Gertz: 66.

Mr. Martineau: It consists of 13 pages.

Mr. Gertz: 66 numbered items, but there is duplication.

The Witness: Yes.

Mr. Martineau: Yes, that's right.

Q. 66, let's see, there is 13 pages plus—13 pages plus 7, that is 20 pages, isn't it? Here is 13 and there is 7, isn't it?

A. That is correct.

Q. In other words, it is actually two documents stapled together, one consisting of 13 pages and another commencing with page 1 consisting of 7, isn't that correct?

A. True.

Q. Therefore the item numbers are carried all the way through, aren't they, Doctor?

A. That's right.

Q. For example, the second stapled document which begins at page 1, formerly had "Number 1" on it, and there was placed in ink "41" "42" "43", et cetera, is that correct, Doctor?

A. That's right.

Q. Now, this you prepared, did you, Doctor?

A. No, sir.

Q. Oh, I must have been confused, I thought you prepared those parallel columns.

A. No, sir.

Q. These were prepared by someone else, then?

A. Yes.

Q. By whom?

A. That I cannot say. I received this, or something so closely similar that I suppose it was either this or the same, from Mr. Gertz.

Q. Do you remember when that was, Doctor?

A. Not exactly. It was before I went to my summer home in June. I took it with me.

Q. In other words, June of 1953?

A. '54.

Q. '54.

A. Yes, this past year.

Q. I see. As I understood your testimony at the last session, I thought you said—correct me if I am wrong—that Mr. Gertz merely asked you to get ready to testify, and he didn't hand you any parallel columns.

A. Oh, no, sir, I hope I made no statement that would give that implication.

Q. I mean, if you did, let us straighten it out right now.

A. Yes.

Mr. Martineau: Excuse me just a minute, your Honor.

Mr. Gertz: Did you notice you brought another thing—

Mr. Martineau: I will get to it. I love papers. Wait a second.

Q. Doctor, calling your attention to the record on page 251, I notice this question:

"In other words, all Mr. Gertz did was say, 'Doctor, would you mind appearing as an expert witness'? and you said in effect, 'Yes,' and then the preparing of the parallel columns was your own idea?

"A. Yes.

"Q. Yes?

"A. Entirely.

"Q. And Mr. Gertz did not tell you, I presume, that he had already prepared some parallel columns of a similar nature?

365 "A. No.

"Q. You are sure he didn't say a word about that?

"A. No, he gave me a set of the parallel columns later, but before he made no reference to anything that he had done."

Q. Was that testimony in error?

A. No. No. The first time I saw Mr. Gertz he asked me if I would be an expert witness in this case, he sketched the case as it stood, and I said yes. Then after that he gave me either this, or substantially the same, or the same set of parallel columns that I took with me to my summer home.

Q. Which, as you recall, was in June of 1954?

A. Yes.

Q. Let us get it straight now, then, completely for the record. The first time you heard of this matter, the matter of you testifying here, Mr. Gertz asked you if you would be an expert witness.

A. Yes.

Q. And you said, in substance, that you would?

A. Yes.

Q. Then at that time you say Mr. Gertz handed you no papers at all?

A. No.

366 Q. And that was when, Doctor?

A. I don't believe I could—

Q. Fix it as well as you can, would you?

A. I am afraid I cannot date it.

Q. Was it some time in the year 1953?

A. No, no, not until this past spring.

Q. It was before you went on your summer vacation, was it?

A. Yes, I can fix that date, that was the 27th of June.

Q. Understand, I am not trying to pin you down to dates.

A. No, no.

Q. I know that is difficult. Shall we say then it was some months before you departed on your summer vacation, some time in the spring of 1954?

A. I don't think it was some months, it was some weeks.

Q. Some weeks?

A. Yes, perhaps three weeks.

Q. In between the time that Mr. Gertz—you had that talk with Mr. Gertz—

A. Yes.

Q. And the time you went on your summer vacation did you do any work on this matter at all?

367 A. Yes, I did some. I took the copy of Mr. Millard's article which Mr. Gertz furnished, and in my own library at home in Hinsdale I began this analysis.

Q. The parallel column analysis?

A. Yes. What I did was to read through the article, take a copy, either one as it came to hand, checked the index, observed whether there was a parallel in the Millard article, and either of the two Eisenschiml books, and marked the points where they were.

Q. Marked the Millard article?

A. Yes.

Q. And that evolved into that set of sheets that you got there, didn't it?

Mr. Gertz: Plaintiff's Exhibit 15.

Mr. Martineau: Q. Plaintiff's Exhibit 15?

A. Yes, yes. Now, to continue, Mr. Martineau, I took this with me on my vacation.

Q. Referring to the—

A. Parallel.

Q. The sheets that Mr. Gertz later handed to you?

Mr. Gertz: Jack, maybe we ought to mark it for identification your number.

Mr. Martineau: Do you know what our next number is, Don?

368 Mr. Reuben: Yes, our next number is 5.

Mr. Martineau: Mark that, please, Defendant's Exhibit 5 for identification.

(Document marked as requested.)

Shall we mark these, too, while we are at it?

The Witness: My new notes?

Mr. Martineau: Oh, these are your new notes?

The Witness: Yes, just rough notes that I made last evening so as I can be at home as you question me.

Mr. Martineau: Defendant's Exhibit 5 for identification are the twenty pages of parallel columns containing 66 items that Dr. Riddle has already talked about this afternoon. Just for the sake of the record.

Q. Will you go on now, Doctor?

A. Yes.

Q. You can refer to this Defendant's Exhibit 5.

A. Thank you. I took Defendant's Exhibit 5 with me on my vacation.

Q. Which you had gotten from Mr. Gertz?

A. Yes.

Q. What, if anything, did Mr. Gertz say about Defendant's Exhibit 5?

A. As I recall, nothing.

Q. Did you ask him, "What is this?"

369 A. No. I looked at it, I could see what it was. As I say, I took it with me. I made no use of it while I was on my summer vacation. I had expected to, but there was illness in the family and I was unable to work at the project at that time, as I wrote Mr. Gertz and Dr. Eisenschiml. Upon my return I returned the document to Mr. Gertz.

Q. Exhibit 5?

A. Exhibit 5. Then when I resumed my own work, I was working entirely independently without even referring to this document. I secured—

Q. Referring to 5, Doctor?

A. Document 5. I secured Exhibit 5 from Mr. Gertz—let's see, we last met on Thursday, did we not?

Q. Yes.

A. On Wednesday, as I recall it, I secured the copy to check with the notes that I had made on Exhibit 15. That is the history of my use of Exhibit 5.

Mr. Gertz: Defendant's Exhibit 5 for identification.

The Witness: Yes.

Mr. Martineau: I think that is understood.

Q. Have you exhausted your recollection as to any conversation you had with Mr. Gertz when he initially handed you Defendant's Exhibit 5 for identification?

370 A. In that particular conversation I have, Mr. Martineau. Mr. Gertz and Dr. Eisenschiml and I met twice subsequently and had dinner together and discussed the work which I was doing, but those were subsequent. At this time I can't recall any further detail.

Q. Would it refresh your recollection to suggest to you, Doctor, that Mr. Gertz said to you, in substance, that these

were 66 items of alleged infringements which Dr. Eisenschiml was counting upon in his affidavit in support of the motion for summary judgment?

A. I presume in substance that would be a fair summary, yes.

Q. So that is it fair to say then, to sum the thing up, that when you received that document, Defendant's Exhibit 5, from Mr. Gertz, you understood it to be a list of claimed infringements by the defendant?

A. Oh, yes, certainly.

Q. Would it refresh your recollection, Doctor to suggest further that either Mr. Gertz or Dr. Eisenschiml suggested to you that they would like to have you verify, if you could, those 66 items?

A. I am sure that that was not said.

Q. What did you understand the document was 371 given to you for?

A. For reference. I assumed that Mr. Gertz and Dr. Eisenschiml would expect me to work independently.

Q. And you say you did work entirely independently?

A. Yes. I could go further and say I have never been prompted in any way by either.

Q. Let me understand this, then. Well, I believe I understood you to say at a later time, after your vacation, you not having been able to use—work on this matter, you returned Defendant's Exhibit 5 to Mr. Gertz?

A. True.

Q. You never used it at all in the preparation of your work?

A. No.

Q. Did you ever compare your final result, Doctor, with Defendant's Exhibit 5?

A. Yes, that is why I requested the use of it.

Q. That has been since you testified here in this case?

A. After I testified the first time.

Q. That is what I mean.

A. The evening before I testified the second time, yes.

Q. Now, you said last Thursday, I think I quote you fairly, that you yourself prepared independently some
372 parallel columns.

A. No.

• • • • •

376 Q. Have you ever written any works, Dr. Riddle, on the subject of Lincoln's assassination?

A. No, sir.

Q. Or any papers of any sort?

A. No, sir.

Q. Have you taught that subject in your teaching of history?

A. Not as such.

Q. I mean, you taught the Civil War period?

A. Not as a separate subject, only as it comes in American history.

Q. In other words, not in the pinpointing of it, so to speak?

A. Yes.

377 Q. Was that just a part of the general historical course in American history?

A. Yes.

Q. Did you teach that in the University of Chicago while you were there?

A. No, sir.

Q. Illinois?

A. Yes, sir.

Q. I forget whether or not you said, I am sure you did, are you presently teaching American history?

A. Yes, sir.

• • • • •

379 Q. In what sense did you give your opinion that
380 Dr. Eisenschiml's works were original, or highly original, Dr. Riddle?

A. May I start with a general statement? The movement for writing the history of the Civil War started as an orthodox narrative from the standpoint of the North. Recently there has arisen what is called the Revisionist viewpoint, which is a complete restudy on the basis of original sources merged with a number of questions of the validity of the older interpretation.

With that I was quite familiar when I ran across Dr. Eisenschiml's book.

Q. You mean with the Revisionist movement?

A. Yes. In Dr. Eisenschiml's books on the assassination of Lincoln there is a parallel to this revision as applied to the story of the assassination in general, and in the most important case, to the role in those events of Secretary of War Stanton. This was the first thing that I noticed.

I was familiar with revisionist attitudes toward Secretary Stanton as they had involved, for example, the problem of the attempted impeachment of President Johnson. Dr. Eisenschiml's findings in the narrow field of the assassination of Lincoln were so new, so original, and so
381 important, they were positively startling. They were revolutionary.

Q. You say his findings, you mean—

A. His conclusions.

Q. —his findings of fact?

A. His conclusions and his findings of fact, the statement of his conclusions, the generalizations which he makes.

Q. In other words, Doctor, see if I state this correctly. Your point is that Dr. Eisenschiml, the facts that he found, the new facts which he found and brought to light, were facts of history, were they not?

A. Yes.

Q. And the conclusions which Dr. Eisenschiml drew from them were to you startling and original?

A. True, although I should like to bring in an intermediary point there; the facts, the organization of those facts in a book, and the conclusions drawn from them.

Q. In other words, do I interpret you correctly that you mean the facts which Dr. Eisenschiml brought forth, we could call them evidentiary facts, I presume, could we not?

A. I should think so.

382 And then the arguments which he made predicated upon those facts, or the inferences which he drew from those facts and put in his books—

A. Yes.

Q. —that is what you mean by originality in Dr. Eisenschiml's works, is it not?

A. Yes. And may I say, Mr. Martineau, I highly appreciate your use of the word "inference". Many people have the reverse concept, many people think that the process of writing history is deduction. It is not, it is induction.

Q. And therefore, Dr. Eisenschiml is incorrect in his affidavit for his motion for summary judgment where he says some of the things he complains about as having been pirated was an alleged theft of his deductions, and I underline deductions.

A. I am not prepared to answer that question, I do not know whether he is correct or incorrect.

Mr. Martineau: Never mind. I am sorry that I got off on this side line.

Mr. Gertz: This is a semantic discussion. Many people, including myself, say deduction when they mean induction, and induction when they mean deduction.

Mr. Martineau: Dr. Riddle used the word in the 383 correct sense, I am sure.

Q. In other words, an inference is something, you look at a series of evidentiary facts, from them you draw a conclusion—

A. Yes.

Q. —and that conclusion is an inference rather than a deduction.

A. Yes.

Q. It is an induction.

A. I could perhaps state it more simply, more adequately. A man writing a historical book ought to approach his subject with his mind not made up. He goes to the sources. If possible, he exhausts the sources.

If you will permit me to make a personal reference, Mr. Martineau, in my book "Abraham Lincoln Runs for Congress"—I am willing to affirm I exhausted the sources, every source on that subject.

A scholar goes to his sources, he collects his information from those sources, then inductively he formulates his hypothesis, comes to his conclusions. That is what I mean by induction.

Q. In other words, when you used the word "original" with regard to Dr. Eisenschiml's books, you did not mean "original" in the sense that they were works of the
384 imagination?

A. Oh, no.

Q. You regarded Dr. Eisenschiml's books as science, the science of history, is that not true?

A. I can say yes, but I don't like the word "science" of history, I still think history is an art. But I think we can get along all right, Mr. Martineau.

Mr. Gertz: Can we stipulate to that, Jack?

Mr. Martineau: It is just a question of terms, of semantics, anyway.

The Witness: Yes. Just let it stand.

Mr. Martineau: I think we all understand.

Q. In other words, as you read some of these facts that you told us about in Dr. Eisenschiml's works, you didn't think you were reading "A Midsummer Night's Dream"—

A. No.

Q. —a work of Dr. Eisenschiml's imagination, you regarded them as statements of historical fact, is that not true?

A. I regarded them as generalizations based upon statements of historical fact.

Q. I was going to get to that part, too, but first of all, you would read, let us say, a fact that Dr. Eisenschiml
385 brought forth say for the first time, as far as you knew,

A. Yes.

Q. And from that fact Dr. Eisenschiml drew an inference.

A. Yes.

Q. Now, I was concerned with that prior question as to the fact which you there read in Dr. Eisenschiml's works for the first time.

A. Yes.

Q. Then you read that fact which to you was then new, and to the world, you regarded that, however, as a statement of a new historical fact discovered for the first time?

A. Yes, a new historical discovery.

Q. But nevertheless, a fact?

A. Nevertheless, a fact.

Q. Now, the inference Dr. Eisenschiml drew from them, would you regard that as pertaining to that historical fact, as an outgrowth from it?

A. If I understand you correctly, my answer is yes. I am not trying to evade your question.

Q. I realize that, Doctor. In other words, when Dr. Eisenschiml states an historical fact and then draws an inference from it, the inference is either sound or
386 unsound.

A. Yes.

Q. If it is a sound inference, then it becomes an ac-

cretion to the historical fact stated by him for the first time.

A. Yes.

Q. Whereas, if it is an unsound inference, then it could be regarded as a fiction, a figment of his imagination.

A. It could certainly be regarded as error.

Q. An historical error.

Mr. Gertz: I will let you go along with this, but, of course, we can agree that opinions can differ as to whether sound or unsound.

Mr. Martineau: That is true. I am not mincing any words with him at all, I just wanted to examine the general idea that if the inference is sound—

Mr. Gertz: In his judgment.

Mr. Martineau: In his judgment, then he would regard that as an accretion to the fact originally stated by Dr. Eisenschiml. Right?

A. Let me make sure that I am being entirely competent here. I am assuming that my answers are the answers of one in the role of an epert witness. That
387 is to say, what a historian or this historian deems.

Q. That's right.

A. That's right.

Q. In other words, I just wanted to make it clear that we understood each other. When you said "original" you mean "original" in the sense that Dr. Eisenschiml, through his labors and his genius stated it on the first time—

A. Yes.

Q. —in the science or art of history—

A. Yes.

Q. —or scholarship as distinguished—the statement of fact and sound inference drawn therefrom, as distinguished from work of fiction or fantasy.

A. Yes.

Q. You didn't mean it original in the second sense, but only in the first.

A. No, not at all in the second, only in the first sense.

Q. I wonder if you can tell me this, Dr. Riddle, among scholars, when historical facts are stated in this manner drawn from them are stated and published to the world,
388 is that regarded as an attempt to teach the world?

Mr. Gertz: I didn't get that question, I am sorry.

Mr. Martineau: It is probably very clumsy.

The witness: No, I understand it correctly.

Mr. Gertz: I didn't get it. Read the question.

(Question read.)

Mr. Gertz: Objection to the question.

Mr. Martineau: It gets right to the heart of the copyright matter.

M. Gertz: I show right on the face of Plaintiff's Exhibit 1, in Plaintiff's Exhibit 1 it says all rights reserved, including the right to reprodnce this book or portions therefrom in any form, so that by Plaintiff's Exhibit 1 expressly there isn't any publishing to the world.

Mr. Martineau: I am asking what the practice is among scholars.

Mr. Gertz: I object to the question.

The Master: He may answer.

The Witness: The effort of what we call producing scholars, that is to say, scholars who carry on research and publish books, is to add to the world's knowledge.

Mr. Martineau: Q. Certainly.

389 A. Yes.

Q. So the answer to my question then is "Yes", isn't it?

A. Yes.

Q. Now, we can agree, I think, that among scholars

Mr. Gertz: Let the record show an objection by me to the whole line of questioning, and a motion to strike the question and answer.

The Court: Objection overruled.

Mr. Martineau: I am sure you won't object to this one.

Q. And the other side of the coin is this, is it not, even though a scholar in publishing such a work does want to teach the world, no one has the right to ape or copy his form of expression, I think we can agree to that, can't we?

A. I would want to break that down a bit. Certainly, anyone has the right to use that, to refer to it.

Q. As an authority.

A. As an authority either in teaching, in lectures, or in published works, but always, of course, with credit given. In that sense my answer is yes.

Q. You mean if credit is given?

A. Yes.

Q. But even if credit is given, and probably I am
390 going farther than I should here, it is not permissible, is it—I am asking you anything about legal circles, but in scholarly circles—it isn't considered exactly cricket, is it, to lift a man's language in haec verba unless you quote him right there as an authority.

Q. Do we agree on that?

A. Yes.

Q. So that is it true likewise in scholarly circles that the idea—the ideas or facts are not regarded as the property, but only the form of expression?

A. No, sir. I cannot agree with you on that.

Q. You cannot go with me on that?

A. Perhaps you would permit me to illustrate in extraneous matters.

Q. Go ahead.

A. The late Professor Fredrick Jackson Turner made a study of American history. He came to a striking new theory, the influence of the frontier in American

history. It came out first only as an article, then it appeared in some of his books. No scholar would write on that or even make an allusion to it without referring to Professor Turner's work and putting a footnote there.

391 Q. To credit Professor Turner?

A. Yes. The late Jim Randall worked the Lincoln Ann Rutledge theme. I cannot conceive that any scholar writing or lecturing on that theme, would do so without giving due credit to Professor Randall. That is the sort of thing, I mean, as an expert witness, that scholars expect.

Q. I see. They do feel, and I think rightly, that a production of something new, something unique, is in some sense—needless to say I don't know if it is a legal sense, or not—in some sense that scholar's property, that scholar has produced it, it is his.

Q. Your answer is confined to feelings among scholarly circles?

A. Yes.

* * * * *

Q. Let us examine into some of these originalities here. You see number 1 there, Doctor?

392 A. Yes.

* * * * *

396 Q. Skip the dots and end of quote. Now, in Dr. Eisenschiml's book, what is that quote from?

A. That is from the Chiniquy.

Q. From Chiniquy's books?

A. Yes.

Q. That is the Reverend Charles Chiniquy?

A. Yes.

Q. Did you ever read Chiniquy?

A. No.

Q. Do you know the name of Chiniquy's book?

A. I know about the book, yes, that is why I never read it.

Q. To refresh your recollection, is it called "50 Years of the Church of Rome"?

A. Yes.

Q. Or is it called "The Assassination of Lincoln"? That is it, "50 Years in the Church of Rome".

A. 50 Years in the Church of Rome, yes.

Q. Published in London in 1886, was it not?

A. I take it that is the book.

Q. Now, calling your attention briefly to that statement by Dr. Eisenschiml, or that quote from Chiniquy,
397 would you say that Dr. Eisenschiml's book is original in the statement of that particular fact?

A. No.

Q. He is quoting from another author, isn't he?

A. Yes.

Q. Chiniquy.

A. Yes.

Q. So that this is not one instance in which Dr. Eisenschiml's book is original, we can agree?

A. Insofar as the datum of this reference, we will agree on that, yes.

* * * * *

398 Q. Now, I think you have already stated, if you
399 haven't you can state it now, in this particular instance you would not claim that Dr. Eisenschiml's work was original, from the statement of this fact?

A. Not from the statement of this fact, no.

Q. Is there any inference drawn from this particular fact that you claim Dr. Eisenschiml was original in?

A. No, I wouldn't rate this as one of the strikingly original unique features of Dr. Eisenschiml's work. Obviously it was known before that the assassination was talked of before it occurred.

Q. Have you ever read Lloyd Lewis' "Myths After Lincoln"?

A. Yes.

Q. He refers to somewhat the same idea, too, doesn't he?

A. Yes.

Mr. Gertz: Don't nod, Don, the record don't get it.

(Discussion.)

* * * * *

400 Q. This item, yes, sir.

A. The only thing I can say, and here again I am operating on the basis of the techniques that I had learned as a scholar, you have a literary relationship which you note, then in each instance you have to determine what the literary relationship is. In one case I will unhesitatingly affirm that it must have been a direct lift from an Eisenschiml's book, in another case of which this is one, I would have to say and cheerfully do say it may have been taken from Dr. Eisenschiml, it may have been taken from Chiniquy or Lewis.

Q. So that to be fair to all of us, then, you cannot say of your own knowledge that Joseph Millard lifted this from Dr. Eisenschiml rather than having gotten it from the source of Father Chiniquy? That is of your own knowledge.

A. As to this item, no.

* * * * *

403 Q. But you are suggesting to his Honor as a matter of probability Millard did pirate this from Dr. Eisenschiml rather than getting it from Dr. Chiniquy, is that what you are suggesting?

A. If I may be permitted to answer in a generalized form.

Q. Could you answer that "Yes" or "No", Doctor? Are you suggesting that to his Honor?

A. My judgment, your Honor, is that the probability is that in all of these cases of identical parallelism or close

similarity, that Millard did secure this from Dr. Eisenschiml's books.

Q. That is what you want his Honor to believe?

A. That is my judgment, your Honor, yes, sir.

Q. Just so we get it clear.

A. Yes, sir.

Q. And, in giving that judgment or that opinion, you did not read the original source?

A. No.

Q. And if the original source contained some material which Millard put in and which Eisenschiml left out, what would you then say?

A. That I would unquestionably conclude that Mr. Millard got it from the source.

* * * * *

408 Mr. Martineau: Q. Now, will you turn to the second item there?

A. Yes, sir.

* * * * *

411 Q. So that Dr. Chiniquy's source were those official archives?

A. Right.

Q. Which are available to the public, I assume, are they not?

A. Under certain restrictions, yes. I have used the archives.

Q. I dare say you have used them many times.

A. Not many times.

Q. You have used them sometimes?

A. Yes. The formality is very simple. You simply have to go to the desk and get accredited, get a card.

Q. In other words, if you can write, you can get a card.

A. They have to satisfy themselves that you have a purpose.

412 Q. Do you regard that statement of Dr. Eisenschiml on page 25 of his book "In the Shadow of Lincoln's Death" a statement of historical fact?

A. Yes.

Q. Is there anything unique about his expression of that fact there, in your judgment?

A. I would say no. In my judgment, no.

Q. In other words, he is stating the fact, the historical fact just with very admirable simplicity and clarity, is he not?

A. Yes.

Q. Now, do you suggest to his Honor that Millard lifted the parallel in "Item 2" from Dr. Eisenschiml rather than from those archives?

A. That is my conclusion, yes.

Q. We can agree though, can't we, on the four corners within this particular incident there is nothing to indicate that?

A. Correct.

Q. Are you acquainted with the work called "The Assassination or History of the Conspiracy, New York, J. H. Hawley & Company, 1865"?

* * * * *

413 Mr. Martineau: If I suggest to you that at page 54 of the last mentioned book it is stated as follows: "In other localities that were remote from telegraph stations, detailed reports of the great crime reached people too soon—" "Too soon" being underlined. (Continuing reading:)

"—and informs greatly exaggerated—"

414 Skip marks. (Continuing reading:)

"—it is useless to assume in such neighborhoods something of the matter was not foreknown. F-o-r-e, foreknown. (Continuing reading:)

"—but by whom?"

If I suggested to you that that book contains that, would that lead you to believe that possibly Millard might have gotten his quote fro mthat work or from the archives?

A. You said, "possibly". I would agree that it is possible, I would add that I think it is improbable.

* * * * *

Q. Now, will you turn to quote 3 in Defendant's Exhibit 5, Millard page 37?

A. Yes, sir.

Q. This language, "At 2:30 in the afternoon of the 14th, Whig Press", do you find that?

A. Yes, I have it.

Q. That is in that same paragraph?

A. Yes, sir, "The Whig Press of Middletown, New York", and so forth.

Q. Is that statement by Millard, in your opinion, the statement of an historical fact?

A. It is a statement of an historical fact, yes.

* * * * *

416 Q. Are there any originalities of style, would you say, in the statement of that historical fact?

A. You are referring to Dr. Eisenschiml at this moment?

Q. Yes.

A. No.

Q. You don't see any piracy by Millard in Dr.
417 Eisenschiml's form of expression there, do you?

A. No.

Q. And both Eisenschiml and Millard make statements of historical fact, we can agree?

A. Yes.

Q. So you wouldn't suggest to his Honor that in this instance Millard lifted what he said from Dr. Eisenschiml, would you?

A. I would repeat my judgment that he did.

Q. All right. Based on the factors you mentioned before?

A. Yes.

Q. But within the four corners of the report of the incident by both, there is no such evidence, is there?

A. No.

Q. Do you remember, Doctor, when we were talking about Chiniquy before, and I think I asked you, in substance, if you were convinced that the original source was Father Chiniquy, he talked about people asking each other something on the streets, do you remember?

A. Yes.

Q. And I think I suggested to you, or asked you if I could show you that in Chiniquy that the verb "asked"

was used in that text, whereas Dr. Eisenschiml
418 didn't use it and Millard did, that that would indicate

to you the probability that Millard had gone to the original source, to Chiniquy?

A. I should still say no.

* * * * *

420 Q. Thank you. Dr. Riddle, I wonder if you could

enlighten us a little bit on this, in scholarly circles would it be considered strictly cricket, kosher, if I may be facetious, in setting up these parallel columns, to excerpt, to make interpolations—strike that out, not interpolations—to eliminate parts of the text and just indicate by skip marks, and then pick up something that is half a page down, is that considered permissible, or fair?

A. It would depend on the use to be made, I suppose,

Mr. Martineau. If some formal use would be made,
421 the quotations should be exact.

Q. What would you say as to the use made of it by Otto Eisenschiml, would you say that was fair?

Mr. Gertz: I object to the question.

The Court: Sustained.

Mr. Martineau: Let us put it this way.

Q. Are there some instances, in scholarly circles, where such a practice would be considered unfair?

A. Oh, certainly.

Q. Now, would you turn briefly, Doctor, to quote number 4 in Defendant's Exhibit 5.

* * * * *

422 Q. Now, comparing those two passages between Eisenschiml and Millard, do you think that there is a treatment copying there by Millard?

A. Yes.

Q. Does Millard purport to state an historical fact?

A. Yes.

Q. Does Eisenschiml purport to state an historical fact?

A. Yes.

Q. And Eisenschiml cites Grant's Memoirs, Volume
423 2, page 508, does he not?

A. Yes, sir.

* * * * *

425 Q. In other words, Grant uses the rough idea of anxiety, of anxious to see his children?

A. Yes, sir.

Q. So does Millard, doesn't he?

A. Yes, sir.

Q. Eisenschiml doesn't, does he?

A. No, sir.

Q. Now, is there anything about that incident, within the four corners of the way Millard treats it and the way Eisenschiml treats it, that indicates to you, within the four corners of that, that Millard copied from Eisenschiml rather than from Grant's Memoirs?

A. No, sir. And I may surprise you, Mr. Martineau, when I volunteer that I think it highly probable that Millard read Grant's Memoirs.

* * * * *

426 Q. Let us take a brief look at item number 5, Doctor, that is on page 105 of Millard.

* * * * *

427 Q. And that is a statement of historical fact, is it not?

A. Yes, sir.

* * * * *

428 Q. Now, in your opinion as a scholar, you see no evidence there that Millard indulged in treatment copying of Dr. Eisenschiml, do you?

A. No, sir.

* * * * *

429 Q. Can we pass this one, then, with the comment that in your opinion as a scholar it is very probable that Millard here, too, read the Memoirs of General Grant?

A. I would regard that as probable, yes, sir.

* * * * *

434 Mr. Martineau: Q. The common source has the word "pretty" in it, doesn't it, in connection with being through with this work?

A. Yes, sir, yes.

Q. And also has the noun "this work", doesn't it?

A. Yes, "I was pretty well through with this work."

Q. Instead of, "his work was practically finished"?

A. Yes.

Q. Now, what does that get us down to as far as likeness, agreement, or difference between Eisenschiml and Millard's common source? Shall we get three red pencils out for that?

435 A. That could be done. My conclusion is that both Millard and Eisenschiml differed from the Grant source, and that Millard is much closer to Eisenschiml than he is to the Grant source.

Q. Because he says, "The work was pretty well fin-

ished" instead of—"His work was practically finished" instead of "pretty well through with his work"?

A. Yes.

Q. It all depends on that, doesn't it?

A. Yes, in this instance, yes.

Q. Thank you. Now, the semantic reference is the same, however, isn't it?

A. They are all presenting the same point.

Q. Yes.

A. Yes.

* * * * *

446 Q. So would you, if you are able, point out from Exhibit 5, Defendant's Exhibit 5, or whatever other papers you need, the instances where you claim the 447 internal evidence or the evidence within the four corners shows to you that Millard copied from Eisenschiml rather than got it from the original source?

A. Yes.

Q. Let's just take them up one by one.

A. All right, if I may consult my notes here?

Q. Yes.

A. I will look for any datum or any data in Eisenschiml for which the O'Beirne papers were cited as a reference.

Q. Yes. Now, let's get those right now so we can have it all in here.

A. All right.

Mr. Gertz: Off the record.

(Discussion off the record.)

The Witness: I am ready, Mr. Martineau. I have made a list from the numbers.

Mr. Martineau: Q. You are now going to refer to the ones in which the O'Beirne papers are used?

A. Yes, yes.

Q. What was the first? Will you give the quote number there?

A. Yes, No. 15.

448 All right. The next is No. 35.

450 The next is No. 36.

452 Q. No. 48?

454 Q. So will you tell us why, on the basis of these O'Beirne references, you feel that Millard lifted this from Dr. Eisenschiml's book rather than from original sources? Is it because the original sources were only in Dr. Eisenschiml's hands?

A. Yes.

Q. And that is a fact known to the world?

A. It is so stated in Dr. Eisenschiml's book.

Q. That is right.

455 A. Yes.

Q. So the only place Millard could have gotten it from would have been either to have in some way, either with or without Dr. Eisenschiml's permission, examined the original source, O'Beirne, or have looked at Dr. Eisenschiml's book and taken it therefrom?

A. That is all that I can see. I can see no other way.

Q. Quote No. 16?

A. Section 16.

456 Q. I see. Now, you say that there is something in Millard's quotation here which indicates to you by internal evidence, within the four corners of the quote, that he got it from Eisenschiml rather than from the original source, is that correct?

A. Stating it as narrowly as you did, I don't
457 think that I could agree to that. It is not merely within these four corners. It is matter, as I understand it, of a probability which, if you wish, I was going to point out.

* * * * *

Q. But can we agree that on this particular instance there is nothing within the four corners which shows a copying by Millard of Eisenschiml rather than from the original source by Millard?

A. So stated I should agree with you.

* * * * *

458 The Witness: All right, I will refer to quote 51.

Mr. Martineau: That is a short one, Elmer, just a couple of lines. Let me read it.

Mr. Gertz: All right.

* * * * *

465 Mr. Martineau: Q. As I understand it, then, Doctor, and let's see if I state this fairly, we can agree that Lieutenant Baker said, quoted in a book written long before either Eisenschiml or Millard, "Only one door of the barn was open"?

466 A. Oh, yes.

Q. That was a public statement, was it not?

A. Yes.

Q. And just because Eisenschiml and Millard are identical on that point you say that that indicates to you that Millard copied from Eisenschiml rather than going to the original source?

A. No, sir, not just because. That might be, as you appear to be intimating, purely a coincidence.

Q. You attach a great deal of weight to the identity of the quotation from Lieutenant Baker?

A. I attach some weight to it, but that is not the determining factor. I will agree with you that so far as

those words are concerned, those words might have been derived from that Baker reference.

Q. You mean, might have been derived by Millard from the Baker reference?

A. Yes. Oh, yes.

* * * * *

468 Q. And if the reference is given to the man's letter like Lieutenant Baker wrote or said, then that is a sufficient reference historically?

A. No, sir, the place where it was read is an essential part of the reference.

* * * * *

469 Q. Now, the mere fact that he does not do it in this particular instance, while it may be a fault of scholarship on his part, doesn't indicate to you that he got it from Eisenschiml rather than the original source, does it?

A. To use your figure of speech, within the four corners of this reference to the doors, no, it does not so indicate.

* * * * *

Q. Now, will you get to the next case where you feel, Dr. Riddle, that the four corners of Millard's quote indicate to you by internal evidence that he lifted from Eisenschiml rather than from the original source?

A. Yes. I would refer to any of the references involved in which Dr. Eisenschiml cites the records of the Washington Police Department.

Q. I believe, sir, you refer to quote number—

A. There are several.

Q. All right, you give them. I won't testify, you
470 tell us.

A. Well, for example—

Q. Let's get them all, now.

A. Yes. Quote 13, again.

Q. Let us follow you. Quote 13?

A. That is the long reference to Parker.

Q. Yes, quote 13, the long reference to Parker telling about him being reprimanded in the Police Department.

Mr. Gertz: Yes, it is a long quote.

Mr. Martineau: It is long so I won't repeat.

Q. What is the next one?

A. Quote 27.

Q. Yes. What is the next one?

A. 34.

Q. 34?

A. Another reference to Parker.

Q. This is where he brought in the prostitute?

A. Yes.

Q. What is the next one?

A. That is all that I have noted.

Q. What about 34-A?

A. 34-A is the one that I just referred to.

Q. Where he was caught sleeping on the beat.

471 Mr. Gertz: 34 and 34-A.

Mr. Martineau: Yes.

Q. Now, have we got all the ones referring to the Metropolitan police records or based thereon, in your judgment?

A. Yes.

Q. Let's see if we have, so we don't have any unfinished business. You have got 14, haven't you? What is 15? What about 15?

A. That is an O'Beirne papers reference.

Q. That is right. Right you are.

Now, you are convinced then, Doctor, that because of the reference to the Metropolitan police records on which these quotes are predicated that Millard must have gotten his information from Dr. Eisenschiml's book rather than from the records themselves?

A. Yes.

Q. Are the records public property?

A. Yes.

Q. They are available to anyone who wants to go and look at them?

A. Yes.

Q. Do you know of your own knowledge that Mil-
472 lard did not look at them?

A. No.

Q. The quotes which you refer to, Doctor—is there what you would call a parallelism of language or expression?

A. Occasionally.

Q. Could you point that out?

A. You mean in any of these that I referred to?

Q. No, I mean the ones about Parker, this last category.

A. We need to go through them. I couldn't do it without looking at them. You see, Mr. Martineau, in this list of the 66 verbal parallelisms it is incidental. It sometimes obtains and sometimes does not, and I have made no point of it.

Q. In other words, if someone says "Who killed Cock Robin?" there is only about one way you can say that, isn't there?

A. Yes.

Q. To ask the question.

A. All right, I will be glad to check some of these 13. A very slight coincidence of language there.

Q. I mean, so slight that to you as a scholar that
473 alone would not indicate a lifting to you, would it?

A. True, it would not.

Q. I see. Then I think we can dispense with that.

A. 14, pretty much the same, the closeness is not important.

34, a slight parallelism.

Q. But so slight that to a scholar it wouldn't indicate any unfair use of the first man's works?

Mr. Gertz: Objection to the question. That is a conclusion.

Mr. Martineau: I am asking as to a scholarly matter.

The Master: He is making a statement. If he puts it in the form of a question I will let him answer it.

Mr. Gertz: Object to it.

Mr. Martineau: Q. Isn't it true that to you, Doctor, as a scholar, this is slight parallelism of language and would not indicate that Millard had unfairly used Dr. Eisenschiml's work?

Mr. Gertz: Objection to the question.

The Master: Well, he may answer that.

The Witness: With reference to what I am here for, Mr. Martineau, the detection of a relationship, then
474 the coincidence of language is of slight, very slight importance. It is not a matter of the coincidence of language.

Mr. Martineau: Q. It is more a matter of the coincidence of facts, the facts stated, is it not?

A. It is a matter of the probability of sources, is what I am trying to get at.

Q. Shall we get on now? We were just dealing with your belief that within the four corners these quotes of Millard's which are predicated upon facts obtained from the Metropolitan police blotters were lifted from Eisenschiml rather than gotten by Millard from the common source. Is there any more you want to say about that?

A. There I wouldn't like to limit it to within the four corners. I am looking at the whole matter, the whole use of the records.

Q. Leaving aside the question of probabilities, Doctor, which we will deal with later—

A. Yes.

Q. I say leaving aside the question of probabilities—

A. Yes.

Q. —and just looking at the four corners of the incident, shall we say, or incidents—

475 A. Yes.

Q. —found in these quotes, can we agree on that?

Mr. Gertz: Agree on what, Jack?

The Witness: Agree on what?

Mr. Martineau: My previous question.

Q. Can we agree that there is nothing there that indicates to you that Millard lifted from Eisenschiml rather than from the original source?

A. Taking each one separately, yes.

* * * * *

Q. Now, will you give us the next instance, Dr. Riddle?

A. Yes, quote 7.

* * * * *

479 Q. I don't know whether you would call that a facsimile or not, but a very fair similitude, isn't it, or copy? Now, from that you say that because no other author had ever published that that train would leave and get Grant into Burlington at 2:58 that afternoon you feel that that indicates to you that Millard copied that from Dr. Eisenschiml?

A. Yes.

Q. Within the four corners?

A. Yes.

Q. Now, can we agree that whenever the train got to Burlington is a matter of historical fact? Can we agree on that?

A. Yes.

Q. And that the timetable, although Dr. Eisenschiml we can agree dug it up in this generation, was likewise a matter of historical fact uncovered by him? Can we agree on that?

* * * * *

480 The Witness: Yes.

* * * *

481 Q. Well, I don't think you quite understand me, Dr. Riddle. I said, aside from the question of the facts, don't you know, do you think that Millard copied Dr. Eisenschiml's way of expressing the fact?

A. Oh, no, it is a general reference.

* * * *

484 Q. What is Eisenschiml's reference for that?

A. The reference is to the Tanner papers in the Philadelphia Union League.

Q. Now, the historical fact stated there is—let's see if we can boil this down—that this man Hanscom was in Lincoln's box?

A. Yes.

Q. In other words, the historical fact is that Hanscom did really get into the box and the statements of this Lieutenant Crawford and Captain McGowan were set up to prove that fact?

A. Yes.

Q. Is that stating it fairly?

A. Yes.

Q. Well, now, that is purely a statement of historical fact, isn't it?

A. Yes.

* * * *

487 Q. Where did Eisenschiml get it from, Hanscom's name? I don't suppose Eisenschiml was there.

A. The Tanner papers.

Q. The Tanner papers?

A. Yes.

Q. And the Tanner papers are matters of public record, are they not, where he who runs may read?

A. I could not certify to that.

Q. They are in the Philadelphia Union League?

A. I know that they are from the Union League.

488 That would be a private organization, and I suppose anyone with a serious purpose would be able to get permission to use them.

* * * * *

490 Q. They weren't exclusively in the possession of Dr. Eisenschiml?

A. No.

Q. Like the O'Beirne papers, were they?

A. No.

* * * * *

491 Q. You have now completed your list of instances in Exhibit C or, what is that called, Defendant's Exhibit 5?

A. That is right.

Q. In which you contended that the internal evidence within the four corners of each of the quotes as listed in that exhibit indicate to you that Millard lifted from Eisenschiml rather than going to the original source?

A. Yes. I was waiting for this last part of your question, Mr. Martineau. The central part of it is with reference to sources.

Q. That is right, yes, sir.

A. And to that question my answer is yes.

Q. That is right. Now, you say you have a second category which indicates to you from the four corners that Millard lifted from Eisenschiml rather than going to the original source?

A. Yes, since no source reference is given.

492 Q. Would you give us those, please?

A. Yes, I can go down that list rather quickly.

No. 6.

* * * * *

Q. Let's see if we understand each other on this, Dr. Riddle. Isn't it true, however, that whether the source is given or not that almost that very identical language is used in Grant's own memoirs about his anxiety to see his children?

493 A. I remember that, yes.

Q. Do you remember that, Doctor?

A. Yes.

* * * * *

Q. Now, don't you think it is fair to say that Grant himself, as a matter of history, mentioned something about his anxiety to see his children?

A. Obviously he did, but the point of similarity between Millard and Eisenschiml is not the fact to which General Grant himself refers, but inferences or an inference drawn from that fact.

* * * * *

496 Q. In other words, they say in substance, both of them, was Grant's reason valid?

A. Yes.

Q. That is what they say?

A. Yes.

Q. And because they both ask the same question you suggest to his Honor that Millard must have copied from Eisenschiml?

A. In view of the similarity in the Millard article and the Eisenschiml book, yes.

Q. When you say similarity, Doctor, do you mean within the four corners of this quote?

A. Yes. Yes.

Q. Well, the similarity being, they both ask the same question?

A. Both ask the same question, both make the same
497 point, that City Point wasn't very far from Burlington, the two coming together.

Q. I forgot to ask you this, Doctor, and it isn't exactly in this context, but I think I would like to get the answer if I could. In scholarly circles when a scholar publishes a book or a paper, documents it, puts its resource forth, is one of the purposes, at least, to teach, in the case of history to teach facts?

A. Oh, yes. We call it contributing to knowledge.

Q. That is right, that is one of the great purposes of scholarship, isn't it?

A. Yes.

Q. And it is to ask questions, is it not?

A. Oh, yes.

Q. And to set people's minds to work and keep them thinking, right?

A. Yes.

Q. Now, is it your feeling that Dr. Eisenschiml is the first person, the first author who ever asked this particular question?

A. I can only say he is the first that I have read.

Q. All right.

A. To raise the question.

498 Q. So Dr. Eisenschiml asks the world the question in effect, why did Grant express this anxiety to see his children?

A. Yes.

Q. Did he answer it, as far as you know, did Dr. Eisenschiml?

A. He answers it by—

Q. By inference?

A. —making an inference that Grant was got out of Washington.

Q. He suggests that, doesn't he?

A. Yes, he suggests that. That was one of his original contributions.

* * * * *

Q. What is the next of this category? This is the category, to refresh my recollection, where Eisenschiml doesn't give any bibliography?

* * * * * *

A. Quote 16, and limiting it to the first paragraph in the quote.

* * * * * *

500 Q. Well, isn't it true that all the accounts of the time did speak of four persons in the box?

A. True.

Q. So there is certainly a common source for that, isn't there?

A. Yes.

Q. Where do we part company here, Doctor?

A. At the point at which Dr. Eisenschiml turned
501 up the Forbes statement in the Chicago Historical Society and published it by quote and by facsimile.

Q. You refer to—let's see, Eisenschiml's bibliography there was "Affidavit of Charles Forbes, used by courtesy of Mr. Frank G. Logan"?

A. Yes.

Q. "And the Chicago Historical Society"?

A. Yes.

Q. Pages 447 to 448, is that it?

A. Yes.

Q. You say no other author had ever referred to that before?

A. Not to my knowledge, and I am pretty sure that none did. This, again, is one of the original contributions.

Q. Did you ever read Abbott A. Abbott's book, "Assassination and Death of Abraham Lincoln"?

A. I do not recall it, Mr. Martineau. I daresay I haven't read it.

Q. Doesn't that book suggest something about this fellow Forbes being in the box?

A. I don't know.

Q. Did you ever read a book called "The Great American Myth"?

502 A. I have seen it. I haven't read it, but I have seen it.

Q. Did you ever read a book called W. J. Ferguson's "I Saw Booth Shoot Lincoln", published in 1930?

A. No.

Q. Did you ever read the Journal of the Illinois Historical Society, September 1946, page 367?

A. Yes, I read that.

Q. Doesn't that have an eye witness account of some woman who witnessed the assassination?

A. I don't recall it in detail. I believe it does.

Q. Doesn't she suggest that there were only four witnesses in the box, or four persons in the box?

A. I believe so.

Q. So we can leave this now—I must confess I am a little confused on this, I hope I am not getting tired; I mean, I am confused as to what you claim is the internal evidence of lifting by Millard.

A. Well, I can only repeat, I have proceeded here on the basis of three categories, the one establishing the basis of literary relationship.

Q. That is the 13, isn't it?

A. That is the 13, the second—

Q. The common source?

503 A. The common source, and the third, an inspection of passages in Millard and Eisenschiml where Eisenschiml does not cite a common source, but in which there is similarity indicating to me that since Mr. Millard could not have derived them from a common source, there being none, he must have derived them from Dr. Eisenschiml.

Q. But you don't know that of your own knowledge, of course, do you?

A. No.

Q. It is possible that Millard got it from another source, isn't it, sources other than Eisenschiml?

A. I could concede the remote possibility.

Q. Will you concede me the possibility?

A. The possibility, yes.

. . . . .

A. Well, for example, quote 22.

. . . . .

507 Mr. Martineau: Q. What is the story on this, Dr. Riddle?

A. You have a reference to this statement of 508 Miss Harris.

Q. By Eisenschiml?

A. By both Millard and Eisenschiml.

Q. Yes.

A. They are very similar. There is no source reference given at this point in Eisenschiml. I conclude that Millard must have derived it from Eisenschiml.

Q. But it is possible that Millard got it from someone else? Can we agree on that?

A. I suppose it is possible.

Q. Have you ever read Lafayette Baker's "History of the Secret Service" published in 1868?

A. Yes, sir, I have read that.

Q. Isn't it a fact that that is the source or a possible source for this thing we are talking about here?

A. Yes, that is involved.

Q. As a matter of fact, I suggest to you that at page 473 Baker quotes Miss Harris' affidavit in which she refers to seeing another man struggling with Major Rathbone in the President's box, but doesn't identify him, and that she made no mention of the first intrusion in the box, is that true?

509 A. Yes, sir.

Q. That is true, isn't it?

A. But my reference is to the conclusions drawn from information.

Q. In other words, your opinion on this incident is based only on what you say are the similarities of the conclusions drawn?

A. Yes.

Q. By Eisenschiml and Millard?

A. Yes.

Q. Not on any likeness or similarity of expression, can we agree on that?

A. Yes, that is so minor that I would disregard it.

Q. In other words, Dr. Eisenschiml said, what about this tremendous discrepancy between Miss Harris' affidavit and the statement she made to the press?

A. Yes.

Q. And Millard asks the same question?

A. Yes.

Q. And your opinion on this particular instance is based solely on the similarity of that historical question, if I may say so?

A. Yes.

* * * * * *

510 A. No. 27, although a source reference is indirectly involved. Qnote 27, Millard, page 114.

* * * * * *

511 Mr. Martineau: We really covered this one, haven't we?

The Witness: With reference to the Metropolitan police record, yes.

Mr. Martineau: Q. Was there anything else you wanted to say about this one?

A. Merely the conclusion drawn by both, so it being one of a series, I conclude that Millard derived from

512 Eisenschiml.

Q. And can we agree that there is no significant treatment copying?

A. Yes.

Q. The conclusion drawn being, then, Doctor, to state it in a word or two, Eisenschiml asked the question—will you state it in your way?

A. He makes the point that it was of the essence to start the search for the murderer immediately.

Q. Yes.

A. But that time was lost.

Q. Yes, and Millard makes the same point?

A. The same point.

Q. But in different language?

A. Yes.

* * * * *

513 Let me see. No. 38, quote No. 38, Millard, page 117, Eisenschiml's "Why" page 49.

* * * * *

515 Q. Now, can we agree that there is no treatment copying or language copying of expression by Millard in this instance?

A. Yes.

Q. What is the similarity, then, Doctor?

A. The point, and a very important point that was made and made first by Dr. Eisenschiml, that no less person than Secretary of War Stanton was involved in the assassination plot. This is detail.

Q. This is one of the facts which Dr. Eisenschiml used in arriving at that conclusion, is that it?

A. Yes.

* * * * *

517 Q. Then all you feel that Millard lifted from Eisenschiml here was just the suggestion or conclusion that the War Department must have known the identity of the murderers or the conspirators?

A. Yes.

Q. We can agree that there is no expression or treatment copy?

A. Yes.

* * * * *

519 Q. Dr. Riddle, I think we had just gotten to quote 42, hadn't we?

A. Right.

* * * * *

520 Mr. Martineau: Q. Now, as I understand it, Dr. Riddle, Dr. Eisenschiml gives no source for this?

A. Right. It is an observation, a conclusion.

Q. Yes. Is it not true, however, that practically every other authority on the subject mentions this tremendous strength of Paine?

A. Yes.

Q. For example, you have read Carl Sandburg's "War Years," I believe you said?

A. Yes.

* * * * *

523 Q. Pardon me, before we get to 43, do we understand then that you are suggesting to the Court that Millard copied this from Eisenschiml rather than from Sandburg or some other source?

A. Yes.

Q. You suggest that?

A. Yes.

Q. But you don't know it of your own knowledge?

A. No.

Q. And you don't, as you sit here now, remember what Sandburg had to say about it?

A. No.

Q. Do you suggest, further, that there is any treatment copying here by Mr. Millard of Dr. Eisenschiml?

A. No, I don't advert to that aspect of it—

Q. In other words—

A. Merely the reference in the same context.

524 Q. I see. Possibly then we can agree on this: Whether Paine had or had not strength enough to subdue Lincoln is, I suppose, we can agree, a matter of historical fact?

A. Yes.

Q. Both Eisenschiml refers to that fact and so does Millard?

A. Yes.

Q. Right?

A. Yes.

Q. And we can agree that there is no treatment copied by Millard?

A. Yes.

Mr. Gertz: What do you mean by treatment copied, language?

Mr. Martineau: Expression copied, that is right. When I have said treatment copying, that is what I mean, the language.

• • • • •

526 Q. All right. Do you regard this as a historical fact as important to the main thesis of Dr. Eisenschiml's work?

A. No.

Q. It is quite a minor matter, isn't it?

A. Yes.

• • • • •

Q. Now, would you get to the next instance in this category, Dr. Riddle?

A. Quote No. 43 immediately following.

• • • • •

529 Q. But how could we sum up the respective observations of Dr. Eisenschiml and Millard, would you say?

530 A. My point is merely that they are similar.

Q. You mean they deal with the same facts?

A. Yes.

Q. In other words, the facts stated as distinguished from an inference is that nothing was done about following up on Fletcher's information, is that fair?

A. Yes, yes.

Q. And can we agree that there is no treatment or expression copying by Millard of Dr. Eisenschiml in this instance?

A. Yes.

• • • • •

531 Q. Doctor, would you say that there was a literary relationship between Dr. Eisenschiml's version of this particular quote 43 and the quote that I gave you from Baker?

A. No, none.

Q. None whatsoever? Now, do you have another instance in this category, Doctor.

A. Quote No. 44 immediately following.

• • • • •

534 Mr. Martineau: Q. Now, is there anything within the four corners of that, Dr. Riddle, which indicates to you that Millard lifted that from Dr. Eisenschiml and not from the original source?

A. Not within the four corners.

Q. It is just that matter of the probabilities?

A. Yes.

Q. Which we will deal with anon?

A. Yes.

Q. I notice Millard and Eisenschiml spell Auger in different ways. Do you know that, Dr. Riddle?

A. In this exhibit they are spelled the same way.

Q. Well, Millard didn't prepare the exhibit. Here is the article.

Mr. Gertz: What passage are you referring to?

The Witness: That is page 114, column 2, line 9 from the bottom.

Mr. Martineau: Column 2.

535 The Witness: Yes, A-u-g-e-r.

Mr. Gertz: At that particular place?

Mr. Martineau: Yes.

The Witness: It is probably a misprint, I would guess.

Mr. Martineau: Q. But the fact remains he does spell it differently, doesn't he?

A. Yes.

* * * * *

Q. But I notice all the way through here in the Millard piece Auger is spelled in that manner. Do you mean that there are a dozen misprints?

A. So I would infer.

* * * * *

538 Mr. Martineau: Q. Can we agree, Dr. Riddle, that
539 Millard does not indulge in any expression or treatment copying at this point?

A. Yes.

Q. And the historical fact, what can we say as to that that both deal with?

A. Again, this is a conclusion drawn.

Q. You mean that both Richards and Auger were in touch with Stanton?

A. Yes.

Q. A conclusion from other facts?

A. It is a conclusion drawn, and the statement to which I am referring here is the conclusion.

Q. I see.

A. There is a conclusion in Eisenschiml and a conclusion in Millard.

* * * * *

541 Q. Let me see if I can get at it this way. I certainly will listen at your feet because I wouldn't try to tell you what historical facts are. If Stanton did have all the facts about who the assassin was, would that be a historical fact?

A. Oh, yes.

Q. And if Richards and General Auger were in constant communication with Stanton, would that be a historical fact?

A. Yes.

Q. So I understand you, if we just take the second one, namely, that those two men were in touch with Stanton, and if from that one we infer that therefore Stanton must have had all the facts, the second one is merely an inference, is that it, or a conclusion?

A. Yes, and it is a conclusion in a historical work.

Q. Well, a conclusion is an inference, I presume, is it not?

A. Yes.

Q. And if the inference is a sound inference we
542 agreed on a former occasion that it becomes an accretion to the historical fact, does it not?

A. Yes.

* * * * *

543 Q. Any other quotes?

A. Yes, quote 45, immediately following.

* * * * *

546 Q. Can we agree that there is no treatment copying or expression copying by Millard of Dr. Eisenschiml in this i ance?

A. Yes, as a matter of fact, there is only one word in exact parallel, so I would make no point of that. I would agree with you.

* * * * *

547 Q. Is this one of these original statements of Dr. Eisenschiml—

A. No.

Q. —here, about this being the only likely route for Booth to follow?'

A. No.

Q. Then you don't regard this as an instance of parallelism, I take it, do you?

A. I do regard it as an instance of parallelism.

Q. Parallelism of historical fact rather than language?

A. Parallelism of narrative between two sources.

Q. Well, when we speak of historical fact, is that the thing which you mean by narrative, Doctor?

A. Yes.

* * * * *

548 Q. Well, then, can we pass this one with the agreement that there is nothing within the four corners of this particular quote 45 which indicates that Millard copied from Dr. Eisenschiml?

549 A. Yes.

Q. Do you have another one in this category?

A. The next one is one with no immediate reference. There is a reference in the general context. It is quote 47.

* * * * *

552 Mr. Martineau: Q. Well, it is a place where Millard differs from Dr. Eisenschiml.

A. Yes, and it is very peculiar. It suggests to me that this is a paraphrase.

Q. In other words, the difference suggests a likeness, or is that being unfair?

A. Oh, I would accept it. The two quotes here are closely similar. My judgment is that Mr. Millard is paraphrasing Dr. Eisenschiml, and in the last part of the quote, the reference to "* * * only to reach the Potomac

in the hope of finding a boat headed north" is unusually close to Dr. Eisenschiml's "* * * that they might find a boat to take them back north to the capital," so I make a point of difference here, that this is within the four corners—

* * * * *

555 Q. Now, let me put this to you, Doctor.

556 Dr. Eisenschiml purports to be giving a historical summation or a report of what Dr. Mudd's statements contain, does it not?

A. Yes.

Q. And what Dr. Mudd said was presumably a historical fact, was it not?

A. Yes.

Q. And Dr. Eisenschiml purports to be quoting as saying that "The fugitives were in a hurry to reach the Potomac, going south, Herold claimed, that they might find a boat to take them back north to the capital," isn't that so?

A. Yes.

Q. So as you read that through don't you understand that Dr. Eisenschiml is quoting, merely quoting a statement of Dr. Mudd's found in the War Department archives?

A. He ~~is~~ not quoting it, he is summarizing it.

Q. I mean summarizing it?

A. Yes.

Q. I accept the amendment. Isn't that true, Doctor?

A. Yes.

Q. And therefore you understand Dr. Eisenschiml to be merely stating a historical fact as stated by Dr.
557 Mudd, isn't that true?

A. Yes.

Q. And since you have not read Dr. Mudd you don't know how close Dr. Eisenschiml is to Dr. Mudd, do you?

A. No, but I know how close Millard is to Eisenschiml.

Q. I think you made that quite clear, and we could both see that but neither of us at the present writing know how close either or both of them are to Dr. Mudd?

A. True.

(Discussion off the record.)

Mr. Martineau: Q. So we could leave this one incident, then, Dr. Riddle, both Eisenschiml and Millard state a purported historical fact, can we agree on that?

A. Yes.

Q. But you feel that in this instance Millard's language is quite close to Dr. Eisenschiml?

A. Yes.

Q. Therefore, this is an instance, you would say, where on the four corners of the quote itself there is some-
558 thing which indicates to you that he copied from Eisenschiml?

A. Yes.

* * * * *

560 The next is one with a context reference, quote 49. Millard, page 118, column 1, paragraph 2, line 2. This is another one of those with Baker as the ultimate source.

* * * * * *

562 Q. You don't know that. Now, let's see. First, we can agree, I assume, that both Dr. Eisenschiml and Millard are stating facts of history here, are they not?

A. Yes.

Q. Can we agree that there is no significant treatment copying or expression copying by Millard of Dr. Eisenschiml?

A. I should say we can agree to that, yes. There is some coincidence of language, but I would make no point of it.

Q. Not what you regard as significant as a literary expert?

A. No. May I continue to answer the question?

563 Q. Certainly, Doctor.

A. There is a highly indicative reference in the Millard article which is what makes this statement important.

Q. Will you give us that?

A. It is connected with the control of these facts by the War Department and is one of those unique discoveries of Dr. Eisenschiml pointing to the complicity of Stanton. That is what makes this significant.

* * * * *

564 A. Yes. The significance is that this as a particular datum, and by itself a minor datum, is used by Dr. Eisenschiml and was used by him for the first time together with other data from which he drew the conclusion that Secretary of War Stanton was implicated in the plot. Now, it is highly significant that the use made of this datum by Mr. Millard is predicated upon that conclusion which was an original contribution of Dr. Eisenschiml. That you will never find in Baker.

* * * * *

569 Q. Now, let me put this to you, Doctor. I put it to you that the whole sum total or tout ensemble, as the French would say, of Millard's article is that it is still an unsolved murder, that we don't know whether Stanton was in it or not. Isn't that the whole burden of Millard's song?

A. That is the implication of his title.

Q. And that is the implication of this very passage, isn't it?

A. Yes.

Q. "Here, again, we face the incomprehensible mystery of the War Department's selective vengeance."

A. Yes.

570 Q. And the title "America's Greatest Unsolved Murder"?

A. Yes.

Q. So wasn't Millard, in your judgment, trying to sell copies of True magazine by suggesting a great unsolved murder whereas Dr. Eisenschiml is suggesting that he has solved it, that Stanton is guilty?

A. I should be willing to accept that, yes. Now, may I add in this connection, Mr. Martineau, what Dr. Eisenschiml does is establish a probability, a degree of probability which is exactly what Mr. Millard does. Dr. Eisenschiml, in my judgment, never proves that Stanton was a conspirator. He establishes a degree of probability which is so great that one can't help but draw that conclusion, as I noted from the book the first time I saw it. That was one of the most praiseworthy things about the book. He did not go further than his sources permitted. The sources reflected this probability, he collected the sources, brought the materials together, and established the degree of probability.

Q. We are going to get into all of this because to me this is the most fascinating part of this case.

A. It is.

571 Q. I know it is to all of us.

A. Yes.

Q. To Dr. Eisenschiml as well, but I just wanted to clean up these small matters first before we expand on the general probabilities.

A. Well, I agree that Mr. Millard presents it as an unsolved mystery.

Q. Now, do we have any others in this category, Doctor?

A. May I check my notes?

Quote 54, and your Honor, that is Millard, page 119, column 2, last four lines.

* * * * *

573 Q. Now, can we agree here that there is no treatment or expression copying by Millard of Dr. Eisenschiml?

A. Yes.

Q. They both state the purported historical fact about holding the hope of a reprieve out to Mrs. Surratt, right?

A. I would disagree in the matter of purported historical fact. Dr. Eisenschiml explicitly points out that this is merely an inference in all likelihood.

Q. Yes, that is right, he does.

A. But elsewhere I accept your statement.

Q. Is there a parallelism of historical fact statement here as distinguished from treatment copying and so forth?

574 A. No, that is why I take it out of the category of historical fact.

Q. I see, because of Dr. Eisenschiml suggesting merely a likelihood?

A. Yes.

Q. Whereas Millard states it as a fact, is that right?

A. Yes.

Q. Well, that isn't even a parallelism of a statement of fact, is it?

A. No.

Q. So we can knock this one out and go on to another one as evidence of parallelism?

A. No, I should not, sir. I should put it with the others and the total effect is cumulative and there it is.

Q. In other words, within the four corners, though, you don't see any evidence of copying by Millard, do you?

A. Not of copying, but of deriving, yes.

Q. What is the evidence within the four corners of deriving by Millard from Eisenschiml?

A. Dr. Eisenschiml's statement of the likelihood that

Mrs. Surratt was promised clemency; the reference 575 in Millard that Mrs. Surratt was offered clemency.

Mr. Martineau: Would you read the doctor's last statement there, Mr. Reporter?

(The record was read.)

Mr. Martineau: Q. Aren't you in error there about Millard saying Mrs. Surratt was offered clemency, Doctor?

A. I don't think so from what is before my eyes here: "Mary Surratt was tortured by having the hope"—

Oh, I see what you mean.

Q. Do you see what I mean?

A. Yes, sir, that is an over-statement, yes.

Q. That is.

A. Yes.

Q. In other words, there is a difference in the use of words there, isn't that it?

A. That is right.

Q. That would tend to be some evidence to the contrary, then, of no copying or lifting or deriving, isn't it?

A. I still don't think so.

* * * * *

579 Q. Well, could it not have been derived from Baker by Millard?

A. Let me put it this way, at least—

Q. If you will just grant me the possibility I will pass on.

A. I would say it was entirely possible—it is per-580 haps probable that Mr. Millard read the Baker book, but I still would make a distinction. I do not believe that either of these could have been derived from the Baker book. What we have here is Dr. Eisenschiml's statement of a likelihood.

* * * * *

583 Q. You feel, and let me see if I add it up correctly —correct me, now, if I am wrong, because I am a little 584 confused here—you do not feel that there is any internal evidence within the four corners of Millard's treatment of this incident which indicate that he copied from Eisenschiml, or you do feel that way?

A. I do not.

Q. You do not?

A. I do not.

Q. It is just a matter of one of those probabilities which we are going to deal with later?

A. Yes.

Q. And see if we can take one fell swoop?

A. Yes.

Q. I am sure that will be saving time to everybody.

* * * * *

Mr. Martineau: Q. Now, do you have any other instances of this category?

A. Yes, sir.

Q. Will you refer to the quote number, Doctor?

A. Qnote No. 58.

* * * * *

587 Q. Now, can we agree on that, Dr. Riddle, that you don't believe that Millard indulged in treatment or expression copying of Dr. Eisenschiml?

A. No.

Q. In his treatment of this?

A. No.

Q. I mean, we agree that he did not, is that right?

A. Yes.

* * * * *

594 Q. Well, don't you think that there is quite a wide spread in your own terminology between Millard and 595 Eisenschiml because if he talks about a crime in the sense of breach of the laws of the nation itself, infer

nally, he is quite different from Eisenschiml who speaks about the laws of civilized war-fare as does DeWitt?

A. There might well be such a difference.

* * * * *

Q. Do you have any others now in this category, any other quotes in this category?

A. This is a very minor one. 59.

* * * * *

597 Q. Now, can we agree that Millard does not, in your judgment, indulge in treatment or expression copying of Dr. Eisenschiml in this quote No. 59?

A. Yes, sir, and I am perfectly willing to add, these are well known facts that could have been derived from the Welles "Diary" or other sources. You see, Mr. Martineau, I have it in the list simply because in making this literary analysis one observes what is there. If it is there, it is there, so I referred to it.

Q. That is right, I understand, Doctor.

A. I will say it was quite minor.

Q. Right. In other words, Millard may have gotten it from Gideon Welles?

A. Yes.

Q. Or any number of sources?

A. Yes.

Q. As well as from Dr. Eisenschiml?

A. Yes.

* * * * *

598 Q. Do you have any others in this category?

A. Yes, sir, completing the list, quote 61.

* * * * *

599 Q. Now, can we agree, Dr. Riddle, that there is no evidence to your mind of any treatment or expression copying?

A. Yes.

600 Q. That Millard indulges in as taken from Dr. Eisenschiml?

A. Yes.

Q. Can we agree that there is no evidence within the four corners of Millard's treatment of this incident or this quote which indicates to you that he copied from Dr. Eisenschiml rather than from common source?

A. Yes, we can so agree.

Q. In other words, shall we throw this incident out as being more or less unimportant?

A. No, sir, I am throwing none out. I am simply putting it into the list of all the rest of them.

Q. All right. But there is no evidence to you here except for that probability factor we are going to come to?

A. Correct.

Q. There is no evidence of any lifting or copying of anything by Millard?

A. No, sir. No, sir.

* * * * *

602 Mr. Martineau: Q. Dr. Riddle, can we agree that to you there is no evidence there of any treatment or expression copying by Millard of Dr. Eisenschiml's
603 book?

A. We can so agree.

Q. And can we agree that on the corners of this quote from Millard, this quote No. 62, there is no evidence which suggests to you that Millard copied from Eisenschiml rather than from the common source?

A. No, sir, I cannot agree to that. Two points: The content of the statement, and much more particularly, the fact that Dr. Eisenschiml published those photographs of the newspapars.

Q. The facsimiles of the newspapers?

A. Yes.

Q. Had you finished, Doctor?

A. Yes.

Q. Let's see if I can state this correctly. Both Eisenschiml and Millard treat of what could be called a historical fact, do they not?

A. Yes.

Q. Eisenschiml has included in his book the facsimiles or photostats, you might say, photographs, of the actual newspaper advertisements?

A. Yes.

Q. Now, I see that Millard mentions "small type 604 afterthought"?

A. Yes, sir.

Q. Is it your position that that indicates that he must have looked at Dr. Eisenschiml's reproduction of the ads?

A. Yes, sir.

Q. And seeing that is was in small type—

A. Yes, sir, the reference also to bold headlines in the same connection.

* * * * *

609 Q. Then the semantic referent, if I may use that term, is the fact that the Grants were the lions of the hour and the Lincolns were played down?

A. Yes, precisely.

Q. And the only thing that you call to attention there is this business about the type?

A. Yes.

Q. The other part was well known historically, the fact that Grant was the lion of the hour?

A. That is correct.

* * * * *

610 Q. 64?

A. 64, and the reference, my reference is to the

concluding statement in the Eisenschiml document—well, in both documents. Paragraph 4, it is the matter of the time that the bullet was shot.

* * * * *

612 Q. Now that I am all exhausted, you can take over.

A. It seems to me that is highly indicative. Mr.
613 Millard says, "The time usually accepted." Now, I think he is right that that is the time usually accepted since Dr. Eisenschiml publishes his books, and he could not have derived that statement, that the time usually accepted is 10:13, from other source.

* * * * * *

615 Mr. Martineau: Q. In other words, both are just stating a fact with all the terseness at their command, aren't they?

A. Yes. The literary parallelism is quite minor, in my judgment.

Q. Quite minor, and the factual parallel, you emphasize, is the 10:13, is that it?

A. Yes, sir.

* * * * *

616 Q. Well, is it accepted now? I think you can give us your expert opinion on that as a matter of historical fact.

A. It is.

Q. So that for Millard to state that Lincoln was shot at 10:13 is merely the statement of a historical fact, is it not?

A. Well, sir, again we come to that, and it appears to me that by that you mean one thing and I understand another. It is a statement of a historical fact.

Q. It is.

A. But the achievement of the discovery of that fact is highly individual. Again, it is one of those unique features.

Q. Let's see if I understand you. You mean that it is not considered in the literary circles in which you move fair or cricket, so to speak, for anyone to say that Lincoln was shot at 10:13 without getting permission of Dr. Eisenschiml?

A. No, sir.

622 Q. Well, how can we leave this one, then? In other
623 words, we agree that Millard does not imitate Dr. Eisenschiml's expression or he does not indulge in treatment copying, but by stating that the time is usually accepted as at 10:13 you feel that he closely paralleled Dr. Eisenschiml, who was the first to announce that fact?

A. Yes, that he derived this from Dr. Eisenschiml.

Q. Yes, the exact time?

A. Yes, sir.

Q. Are there any other quotes in this category, Dr. Riddle?

A. I see that I have one at 65. This again, would be a minor one, the latter part of the reference to 65.

625 Q. Now, can we agree that Millard does not copy the expression of Dr. Eisenschiml in treating this incident?

A. Yes.

Q. And he doesn't indulge in what we call treatment copying in this instance?

A. No.

626 A. An opinion. Dr. Eisenschiml, in his book, refers to the testimony. That could be satisfied about the source reference, but Dr. Eisenschiml makes the observation that a clever lawyer might have made something of this. Now, when I see Millard leaving the source reference

and following or paralleling Dr. Eisenschiml, I conclude that he derived this from Dr. Eisenschiml.

Certainly we will agree with you that it is not the statement of a historical fact by either one, it is an expression of an opinion, that is true, what a clever lawyer might have done or a good lawyer.

627 Q. Doctor, before you get into that, could I ask you this one question on this one incident here?

A. Yes.

Q. I don't know what your experience with legal matters has been, but you think it is a fairly logical conclusion for anybody to suggest that a man on trial for his life should have had a lawyer that would call attention to such a vast discrepancy in the description?

A. I should think so, by all means.

Q. I mean, there is nothing unusual about that?

A. No, sir.

Q. Either in Dr. Eisenschiml's expression about it or in Millard's, isn't that a fair statement?

A. Quite correct.

633 Q. Yes. Calling your attention to 53 for a moment, let's look at it.

A. Yes.

Q. In Dr. Eisenschiml's affidavit in support of his motion for summary judgment, Dr. Riddle, he says this after item 53, and, Elmer, you can follow this.

Mr. Gertz: Yes.

Mr. Martineau: Q. "This incident"—meaning this Lafayette Baker incident—is taken from a very rare book by Velasquez "Story of the Civil War, 1890." The significant thing is that in the original, the last part of Baker's remark is not in italics (See Shadow), page 379, note 43. Eisenschiml put them in and Millard copied them.

A. Yes, sir.

Q. "A dead give-away"?

A. Yes, sir.

634 Q. I am just calling your attention to the language.

A. That appears—

Q. Yes, we had discussed that to some degree, but I just want to call your attention to this. Is that a correct statement about this Velasquez being a rare, a very rare book?

A. Yes, sir.

Q. Have you ever read Velasquez?

A. No, sir.

Q. You never have?

A. No.

* * * * * *

637 Q. Right. Now, isn't that book in the Public library?

A. I do not know.

638 Q. The Chicago Public Library?

A. I don't know.

Q. What I am directing myself to is its unobtainability or its rarity, so to speak.

A. I simply don't know.

Q. I put it to you, Dr. Riddle, that it is on an open shelf in the Public Library.

A. I don't know. I would be glad to take your word for it, Mr. Martineau.

Q. I can't testify, you know.

A. No.

Q. But I just put the question to you.

A. But as man to man, I am perfectly willing to take your word for it.

* * * * * *

639 Q. Yes. Well, let me put it to you this way then,
640 and see if we can agree on this. If a scholar were

interested in seeing what Mrs. Velasquez had to say about this incident and writing some historical piece, and if he could go to the Chicago Public Library and get the book and get the original text, could we agree that it would not be a rare book?

A. No, sir.

Q. In the sense of inaccessibility?

A. I still wouldn't so agree. Supposing the scholar lived in Cairo, Illinois, or in Eau Claire, Wisconsin?

Q. But if the scholar lived in Chicago, then—

A. If the scholar lived in Chicago he could with slight difficulty get hold of it.

Q. Or if the scholar were sojourning in Chicago and writing his piece in Chicago?

A. He might, yes.

Q. And would the same be your opinion, Dr. Riddle, if the book were available in the New York Historical Society Library and a scholar were sojourning in New York and doing his writing?

A. Yes, but it still would be a rare book.

Q. But not rare in the sense of inaccessibility, isn't that right?

A. I would still say it is rare in the sense of in-641 accessibility.

Q. All right. I now show you a book, Dr. Riddle, from the Chicago Public Library entitled "The Woman in Battle" by C. J. Worthington, and it bears Chicago Public Library No. B, and then below that, 644a, and on the frontispiece I see a picture of Madam Velasquez in female attire, a very interesting drawing, and then I see over here:

> "The Woman in Battle, a Narrative of the Exploits, Adventures and Travels of Madam Loreta Janeta Velasquez, Otherwise Known as Lieutenant Harry T. Buford, Confederate States Army, in Which

Is Given Full Description of the Numerous Battles in Which She Participated as a Confederate Officer; of Her Perilous Performances as a Spy, as a Bearer of Dispatches, as a Secret-Service Agent, and as a Blockade Runner; of Her Adventures Behind the Scenes at Washington, Including the Bond Swindle; of Her Career as a Bounty and Substitute Broker in New York; of Her Travels in Europe and South America; Her Mining Adventures on the Pacific Slope; Her Residence Among the Mormons; Her Love Affairs, Courtships, Marriages, etc., etc.

642 "Edited by C. J. Worthington, Late of the United States Army."

I will ask you, Doctor, to look at pages 516 and 517 of that book and see if you don't find the identical language you just quoted from the other book?

A. Yes, sir, the language is identical. It looks as though it is printed from the same plates.

Q. Yes, and there again there is no italics, right?

A. Correct.

Excuse me a moment.

* * * * *

644 Mr. Martineau: Q. Let me see if I can frame this question so that I won't offend Elmer's sensibilities. In leaving this incident, then, Dr. Riddle, can we agree that the only thing which indicates to you that Millard may have lifted from Eisenschiml this quote of Lieutenant Baker's which came originally from Velasquez is the fact that Dr. Eisenschiml italicized some words and Millard italicized some, but not all the same words?

A. No, sir, that is not the only thing. That, yes.

Q. That is one factor, is it?

A. That is one factor, but there is another.

645 Q. What is the other factor?

A. The other is this whole matter of probability that we have referred to several times.

Q. Okay, saving that, Doctor, we are going to get into that, but saving the probabilities and looking at the four corners as we have been doing of the incident of this quote, could we agree that the only thing which indicates to you that Millard lifted from Eisenschiml rather than going to the original source, Velasquez, is the use of italics by both people?

A. Within the limits, yes.

Q. Yes, saving your matter of probabilities?

A. Yes.

Q. Your factor of probabilities?

A. Yes.

Q. Now, after that, Doctor, do you remember at the end of our last session you said that we had gone through the category—just to refresh your recollection we started out like this—I asked you if with the exception of the 13 instances which you pointed out of identical language—

A. Yes.

Q. —if we could agree that none of the other 72 646 alleged parallelisms contained within their four corners internal evidence which indicated to you as an expert that Millard had lifted from Eisenschiml rather than having gone to the common source, and you answered, I believe I quote you correctly, saying that you could not agree to that because there were some other factors that you wanted to discuss.

Then I asked you to point out those instances where that did not exist, and we spent the rest of the day on that.

A. Yes.

Q. At the end of the day, when we had come, I think, down to about the last one of those quotes on your list, you said that there were some other factors that you wanted to discuss.

* * * * *

647 A. Yes, certainly. Quote No. 8, which is from Millard, page 105.

* * * *

Mr. Martineau: Q. Now, would you say that there is any parallelism of language or treatment copying
648 there?

A. Slight, very slight.

Q. I mean, is there something there that indicates to you that Millard indulged in treatment or expression copying?

A. No.

Q. From Dr. Eisenschiml?

A. No.

Q. It is just a parallelism of incident?

A. Yes.

Q. Historical incident?

A. Yes.

Q. Would you point that out to his Honor, Doctor?

A. You mean in detail by reference to the language?

Q. Well, is it a reference to incident or what?

A. My point is that Mr. Millard's language appears to be a paraphrase of Dr. Eisenschiml's language, the similarity of the subject matter in substance which does not extend to those parallelisms of phraseology.

* * *

653 Q. Would you tell us how you arrived at that conclusion, Doctor?

A. Yes, sir.

Q. By comparison?

A. I arrive at that conclusion because I know how books are written. Books are written in a number of ways. One of them is the scholarly way which is followed by Dr. Eisenschiml in which sources used are always identified, and exact reference is made to them.

Now, an author who, for some reason does not undertake

to do that may very easily and conveniently derive his materials from the products of these scholarly books in which case he has the material before him without the necessity of going to public libraries or to source collections and spending a considerable amount of money in making his own independent research, and that is my inference of what Mr. Millard has done based upon this passage, and much more particularly, upon numerous other passages.

Q. Well, let's stick to this one, if you don't mind. We will cover them all together, but is there anything in the internal evidence here, within the four corners,
654 which indicates to you, sir, that Millard paraphrased Eisenschiml rather than consulting the original source, Badeau?

A. I am quite willing to offer the judgment, Mr. Martineau, that Badeau is a readily accessible book and that Mr. Millard may have read it.

* * * *

Q. Is there anything in the four corners of Millard's treatment of this incident as contrasted to the four corners of Dr. Eisenschiml's treatment of it which indicates to you that Millard merely paraphrased Eisenschiml rather than consulting the original source, Adam Badeau?

A. I think there is, sir.

Q. And is it found in that language which you have just read?

A. Yes, sir.

Q. Do you base this on your conclusion that there
655 is a similarity of words?

A. That there is a close similarity of sense:

"Could have offered no pleasure to Grant's wife";

"Did not enjoy the prospect of an evening in the same loge";

The same idea expressed in different words.

Q. In other words, Dr. Eisenschiml puts it how?

A. "It is no wonder that Mrs. Grant did not enjoy the prospect of an evening in the same loge with the Lincolns."

Q. Yes, which we can agree is a conclusion of Dr. Eisenschiml's of a mental state of Mrs. Grant?

A. Yes.

Q. Now, how does our friend Millard put it?

A. "The prospect of risking another crazy tantrum in a crowded theatre could have offered no pleasure to Grant's wife."

Q. Yes, so you have Millard using the idea of pleasure or no pleasure and Eisenschiml using the word "enjoy"?

A. Yes, sir.

Q. And it is just that, and that alone, which indicates to you by internal evidence that Millard paraphrased Eisenschiml without consulting Badeau?

A. There is the other sentence:

"Had been publicly humiliated";

"Had again been rudely insulted."

Q. Now, let's see. Millard says that "Twice Julia Grant had been publicly humiliated by Mrs. Lincoln." etc., right?

A. Yes.

Q. Eisenschiml says "She had been rudely insulted," and the first humiliation is described at such and such a page, right?

A. Yes, sir.

Q. Now, you feel that that indicates to you that Millard paraphrased Eisenschiml without consulting Badeau?

A. Yes, sir.

Q. Have you ever read Badeau on this point?

A. No, sir.

Q. And you testified without ever having read Badeau?

A. Yes, sir.

Q. So that you are unable to state now whether or not

Dr. Eisenschiml did not—giving credit, of course,—lift from Badeau?

A. Yes, sir, that is why I said I didn't know
657 whether he quoted.

Q. Yes. Well, isn't it true that Badeau describes at considerable length this excursion to the front where Mrs. Lincoln and Mrs. Grant went in an ambulance and Mrs. Lincoln flew into a tantrum and insulted Mrs. Grant? You wouldn't know about that, would you?

A. Well, I remember the report of the same incident in Dr. Eisenschiml's book in which Badeau is given as a reference.

Q. That was good enough for you?

A. Yes.

Q. I mean, you didn't take the trouble to read—

A. Yes, exactly.

Q. Let's exhaust this incident. Is there any other thing which by internal evidence indicates to you—

A. No, sir.

Q. —that Millard paraphrased Eisenschiml?

A. No, sir.

Q. Can we agree, Doctor, that it wouldn't take an expert psychologist or novelist or historian to arrive at the conclusion that a woman in Mrs. Grant's position would hardly enjoy, or would take no pleasure, from a woman in Mrs. Lincoln's position indulging in shrieking abuse
658 which Badeau recites and which Dr. Eisenschiml recites in his book?

A. To that I would say yes.

Q. In other words, there is nothing unique or anything requiring any literary or psychological genius in arriving at that conclusion?

A. No, sir.

Q. All a man has to do is have been married, isn't that right?

Have we exhausted this incident now, Dr. Riddle?

A. As far as I am concerned, yes, sir.

Q. Now, do you have another one which you would like to discuss?

A. Quote 9.

Q. Quote No. 9. Now, you read the last one so I will read this one and save your pipes.

A. Thank you.

* * * * *

661 Q. Can we agree as to this one that there is no internal evidence that to your mind suggests that Millard lifted or indulged in treatment or expression copying from Eisenschiml rather than consulting the original source, Moorefield Storey?

A. My conclusion on this quote is the same as in quote 8. It is a paraphrase, in my judgment; it is a paraphrase of the Eisenschiml statement.

Q. But you don't know of your own knowledge whether or not it may not be a paraphrase of the Moorefield Storey statement?

A. No, sir.

Q. Since you have not read the latter?

A. No, sir.

Q. And if it were, then you would of course change your opinion, wouldn't you?

A. Yes, sir.

Q. Let's analyze this a bit. Dr. Eisenschiml in this quote 37 purports to relate historical facts, does he not?

A. Yes.

Q. He is telling what Stanton did that night,
662 right?

A. Yes, sir.

Q. And Millard reported the same thing?

A. Yes.

* * * * *

663 Q. Yes, what was the news that he did not get at that particular time, according to Eisenschiml?

A. "Of the attack on Lincoln he was not apprised until later."

Q. Yes. Now, what does Millard say was the news that Stanton got on that occasion?

A. "With the news of Lincoln's assassination."

Q. That is a difference, isn't it?

A. Yes, sir.

Q. Wouldn't that indicate to you that Millard must have gotten that information from some source other than Eisenschiml?

A. No, sir.

Q. It is a difference, though, we can agree on that?

A. Oh, yes.

Q. Ordinarily wo'dn't differences indicate a non-parallelism?

A. Yes, sir.

* * * * *

664 Q. I see. Well now, as to the statement of historical fact, however, does not Millard differ seriously from Eisenschiml as to the news which Stanton then received?

A. Yes, sir.

* * * * *

669 Q. Now, does my reading of that suggest to you that Dr. Eisenschiml did, as you opined, rather closely parallel his source?

A. Yes, the Atlantic source?

Q. Yes, sir.

A. Yes, sir.

Q. Could we agree, then, Dr. Riddle, that looking at this particular quote, No. 9, within its four corners, Dr. Eisenschiml's treatment of it, that there is nothing unique about his statement of this incident described here?

A. Nothing unique about Dr. Eisenschiml's?

Q. Yes.

A. Yes, sir, we could agree.

Q. I mean, this is, I suppose, more a minor point in the main plan of the story here, isn't it, this incident?

A. Of the story of the assassination.

Q. Yes.

A. Yes, sir.

Q. Do you have another one, Dr. Riddle?

A. Yes, sir, quote 10.

* * * * *

671 Q. Yes. Now, let's see, both Eisenschiml and Millard are here, purporting to recite a mere report of what Stanton testified to?

A. Yes, sir. The Eisenschiml footnote is to "Impeachment Investigation, Government Printing Office, Washington, D. C. 1868, Page 400."

Q. Yes. They both purport to giving a report of testimony given in the impeachment investigation. That was of President Johnson, wasn't it?

A. Yes, sir.

Q. Can we agree that there is no treatment or expression copying by Millard of Eisenschiml in this instance?

A. No, sir. The coincidence of the words "under oath" and "at all" with less close similarity in the reference to being present in the War Department; "did not visit the War Department"; "had not been to the War Department."

* * * * *

674 Q. Would you say that Dr. Eisenschiml's recitation of this quote No. 10 that we have been dealing with—is it fair to say that there is nothing particularly unique about this within its four corners, this report of this incident?

A. I take it that what a man says is unique, yes.

Q. You mean unique in his form of expression?

A. Yes. Perhaps I don't follow you, Mr. Martineau.

Q. Well, all you wanted to find out was, you testified, and I am going to ask you something about that a little later, that Dr. Eisenschiml made a number of important new findings?

A. Yes, sir.

Q. Is this particular incident one of those findings that no other author had mentioned?

A. It is a detail of the unique generalization.

Q. Yes, but the detail itself, there is nothing unique about this, is there?

A. No, sir, that is information to be found in the impeachment proceedings report.

675 Q. And is it not also to be found in Flower's book on Edwin McMaster Stanton published in 1905, page 271?

A. I don't know.

Q. You had never read that book?

A. I have read it, but I can't testify that it is there.

Q. Well, let me put it to you that at page 271 Mr. Flower says this:

"* * * Stanton under oath, testified * * * as follows: 'The order of Mr. Lincoln on April 12 on file in the War Department is the last order he ever made of which I have any knowledge. It was the last time he was in the War Department.' "

Do you recall that now?

A. I will gladly take your word for it, Mr. Martineau.

* * * * *

679 Q. Well, do you feel that this suggests to your mind, this incident before we leave it, that Millard was seeking to conceal literary piracy by this parallelism? I mean, as a scholar when you look at that does that suggest that to your mind?

A. May I speak a bit informally, Mr. Martineau? You see, I don't want to appear to be sarcastic in my answers to you. I am trying to testify as an expert on the basis of a technique of literary analysis. All that I would wish to make of this point is that this was derived from Dr. Eisenschiml.

Q. In your opinion?

A. You see, I am not desiring to impute such a thing as piracy.

Mr. Gertz: In other words, you are not drawing any legal conclusions?

The Witness: No, sir.

Mr. Martineau: Q. Would you also say—

A. That is why I hesitate to accept your statement.

Q. Would you agree that Dr. Eisenschiml derived his statement of it from the—

A. From the impeachment proceedings.

Q. —from the impeachment proceedings?

A. Yes, sir.

680 Q. Which are public property, aren't they?

A. Yes, sir.

Q. Do you want to get on to the next one, then, if you have another one?

A. Yes, sir, I have several more. The next one is No. 11:

* * * * *

682 Q. Now, do I understand then, sir, that in Millard's treatment of this incident which you and I have jointly read that you see there within the four corners a treatment or expression copying of the similar treatment by Dr. Eisenschiml?

A. Yes, sir.

Q. I wonder if you would point that out?

A. Certainly parallel.

Q. I am concerned mostly with whether or not you see evidence of treatment—

A. Yes, sir.

Q. —or expression copying?

A. I will say I do see evidence of treatment or expression copying.

Q. Will you point that out to his Honor?

A. Yes, sir. The first, the use of a rhetorical ques-
683 tion by both Dr. Eisenschiml and Mr. Millard.

Q. That indicates parallelism to you?

A. Yes, sir. The language of the question is different, and has only in common the inquiry about Eckert, but there is in each case a rhetorical question.

Q. In other words, the expression is different, but the question—

A. The use of the literary form.

Q. Yes. In other words, would you say this, then: that semantically, if we use the knowledge of semantics, the referent is the same but the symbol is different, is that correct?

A. Yes.

* * * * *

684 Q. Now, I suppose that this was all published, you understand, in the Boston Post?

A. Yes, sir.

Q. Of April 11, 1915, right?

A. Yes, sir.

Q. So that was a matter of public record, I take it, could we agree to that, you as a scholar?

A. Yes, sir, it is there for one to get who wants
685 to dig it out.

Q. No one has a monopoly on that, do they?

A. No, sir.

Q. You would not find anything unique in Eisenschiml's reference to the incident itself, I take it?

A. No, sir.

Q. We grant you that Eisenschiml is entitled to owner-

ship of his form of expression, that is certainly true, but is that the sense in which you use the word "paraphrastic"? I was fascinated by that word, "paraphrastic".

A. Conveying the same sense.

Q. The same sense?

A. Yes, in not necessarily the same words.

Q. Yes, the same sense. Then we can agree that except for those few words which you pointed out there is no similarity of language between Millard and Eisenschiml?

A. Yes, sir.

Q. Only a similarity of the ideas conveyed?

A. We can so agree.

* * * * *

686 Q. Now, would you pass on, Doctor?

A. Quote 12, Millard, page 106.

* * * * *

687 A. The parallelism as shown in the exhibit reverses the order of the two parts of the quote. The first part exhibited is found on page 38 of Eisenschiml's "Why Was Lincoln Murdered?"

Q. Let me see, before you get to that, in other words, in order to make out a case of parallelism here we have to reverse things, do we?

A. They are reversed.

Q. I see. The cart before the horse?

A. Sir, I don't know the answer to that.

Mr. Gertz: You mean you don't know who put the cart before the horse?

The Witness: I didn't do this, I don't know who did it, and I merely call attention—

688 Mr. Martineau: Q. You don't approve of this reversal business, do you? Isn't that a little bit non-cricket in these literary circles?

Mr. Gertz: Objection.

* * * * *

692 Q. Now, do I understand you to say, sir, that there is internal evidence within the four corners of Millard's treatment of this quote No. 12 that he lifted from Eisenschiml rather than from the original source?

693 A. It is my conclusion that this was derived from Dr. Eisenschiml. It is based, again, on the exact coincidence of the two words, "only three," and the paraphrastic similarity of the general passage in Millard, the two passages in Eisenschiml which, although separated in the book, are closely connected and refer to the same incident.

Q. Yes, sir. In other words, does this sum it up fairly, then: The only expression similar between Millard and Eisenschiml is the phrase "only three" in reference to telegrams or messages, and then the remainder of it which indicates to you a derivation by Millard from Eisenschiml is merely the fact that they treat of the same historical incident? Is that a fair statement?

A. In a similar fashion.

Q. Well, by "in a similar fashion" you don't mean with the exception of the "only three"?

A. No, sir, I was merely wishing to include in your restatement my reference to paraphrastic treatment.

Q. And by that you meant treatment of the same incidents in different forms of expression?

A. Yes, sir.

* * * * *

695 Q. Can we agree, Doctor, that Dr. Eisenschiml's treatment or recitation of the historical facts contained in this book is merely recitation of historical fact, aside from the expression unique to Dr. Eisenschiml?

A. I would quibble somewhat at your use of the word "only", but apart from that I could agree with you.

Q. Well, shall we complete the rest of the "only"

696 part then, so we get the whole story? He does purport to recite historical facts?

A. Yes, sir.

Q. He does purport to quote official records?

A. Yes, sir, to refer to, not to quote.

Q. That is right.

A. He does, however, quote the three telegrams.

Q. That is right, the three telegrams, and not having the official records which he refers to here we cannot say, either of us, whether they referred only to three telegrams or not, can we?

A. No, sir.

Q. At least I cannot. So that the only expression or language similarity is the phrase "only three" as you pointed out, the rest is mere paraphrastic parallelism?

A. It is paraphrastic parallelism, yes, sir.

Q. Thank you. Anything more you want to say about this particular incident?

A. No, sir.

Q. Do you want to pass on now if you have another one?

A. Yes, sir. Quote 13, back to Parker.

* * * * *

700 Q. Well, I mean, would you characterize it as a historical expert as being a very slight coincidence of language?

A. I wouldn't characterize it as a slight coincidence.

Q. You would characterize it as being an unimportant coincidence, would you not, looking at the coincidence of words alone?

A. Yes, sir, looking at the coincidence of words alone.

Q. Yes.

A. Yes, sir.

* * * * *

710 Q. We can proceed in the same manner?

A. Yes, proceed in the same manner.

Q. That is No. 14, is it?

A. Yes, sir.

* * * * *

711 Q. Now, that first paragraph, you say there is no verbal similarity of any significance between Millard and Eisenschiml?

A. Yes, sir.

* * * * *

712 Q. Now, you say, Doctor, there is a verbal similarity between that treatment of Millard's and the treatment of Eisenschiml of the same incident?

A. Yes. Yes, sir.

Q. Will you point that out?

A. The words in Millard, "kicked by a man he was trying to arrest"; the words in Eisenschiml, "kicked from a man he was endeavoring to arrest."

Q. In other words, Millard says "trying" and Eisenschiml says "endeavoring"?

A. Yes, sir.

Q. Millard says "kicked," and Eisenschiml says "Parker received a severe kick"?

A. Yes, sir.

Q. Is that the only verbal similarity?

A. Millard says "by"; Eisenschiml says "from".

Q. Well, those are verbal differences, aren't they?

A. Yes, sir. I said it extended to some verbal similarities.

713 Q. I see. Well, by those verbal differences you don't mean and these aren't the verbal similarities you are talking about, are they? I don't follow you there.

A. I pointed out the verbal similarities. The words "kick", "a man", "he was", "to arrest"--those are exactly coincidental.

Q. Well, "kick" Millard has a verb, "being kicked"?

A. Yes, sir.

Q. And Eisenschiml has it as a noun, "he received a severe kick"?

A. Yes, sir.

Q. That isn't an exact similarity, is it, that is a paraphrastic similarity?

A. Yes.

Q. The words are different, one is a noun and the other is a verb?

A. Yes, one is a noun and the other is a verb.

Q. And "endeavoring" is certainly verbally different from "trying", isn't it?

A. Yes, sir.

Q. So about the only thing left is "to arrest," isn't it?

714 A. "a man".

Q. "a man", and "to arrest"?

A. Yes, sir.

Q. You wouldn't regard those as significant verbal similarities, would you?

A. No, sir.

Q. Is there another one in the same Parker context?

A. No, sir, and I might mention that in this case, Dr. Eisenschiml's book, reference is made to the record of the Metropolitan Police.

Q. Yes. What is the next one, Doctor?

A. The next one is quote 18.

* * * * *

718 Q. The Eisenschiml recitation jumps over five pages, doesn't it?

A. That is right, from this paragraph at page 24, pages 25, 26, 27, 28 and to 29.

* * * * *

719 Q. Now, do you see there any internal evidence within the four corners of Millard's treatment of quote No. 18 that he copied from Dr. Eisenschiml's expressions or his form of expression?

A. There is no close coincidence of language except in the words, "The Editor of the National Republican".

Q. That is the only close verbal parallelism?

A. Yes, sir.

Q. And that is, of course, a description of this Mr. Hanscom, is it not?

A. Yes.

Q. Aside from that can we pass on to any possible verbal parallelisms? There is a parallelism of incident, is there not?

A. Yes, sir.

• • • • •

721 Q. And could you agree that as far as the internal evidence is concerned on the four corners that Millard may have derived from the common source, which is Pendel or the Washington National Republican? Is it possible that he could have?

A. It is possible.

• • • • •

Mr. Martineau: Q. Do you want to take up the next one, Doctor?

A. Yes, sir. Quote 20.

• • • • •

724 Q. So as to this one you feel that the use of these three words here, "made no mention," which Millard used, which words parallel Eisenschiml, indicates to you that Millard copied Eisenschiml's 'anguage?

A. Yes, sir.

Q. Rather than looked at the original source?

A. Yes, sir.

725 Q. But it doesn't indicate to you that Millard, whatever use he made of Eisenschiml's expression, did not look at the common source, did it?

A. It would seem to me that he may have read Pitman.

Q. Yes, and your point is that he used the same three words in characterizing or summarizing McGowan's testimony that Eisenschiml did?

A. Yes, sir.

Q. Do you regard Dr. Eisenschiml's statement of his part of what we call quote 20 as being one of those unique discoveries that Dr. Eisenschiml made which you referred to?

A. A detail of the unique discoveries.

Q. Well, Dr. Eisenschiml did not discover what McGowan testified to, though, did he?

A. Oh, no.

Q. Is it fair to say that what you mean by a detail is the use that Dr. Eisenschiml made of this testimony of McGowan or absence of testimony, that is what you would regard as that which was unique in Dr. Eisenschiml?

A. Yes, sir.

Q. Does that state it fairly?

726 A. Yes, sir.

Q. But the incident itself, there is nothing unique about that, is there, the McGowan testimony?

A. No, sir.

Q. In other words, the inference Dr. Eisenschiml drew from it and other facts is what was unique?

A. Yes, sir.

Q. Do you want to pass on to the next one?

A. Yes, sir, quote 21.

* * * *

727 Mr. Martineau: Q. Now, both Dr. Eisenschiml and Millard are purporting to set forth some testimony there, are they not?

A. Yes, sir.

Q. Do you feel that there is any treatment or expression copying by Millard of Eisenschiml there?

A. No, sir.

* * * * *

Q. And the recitation of the incident alone here, on the part of Dr. Eisenschiml, apart from the inference which he drew from it, does not to you as a historical scholar seem unique, does it?

A. Limiting it to the incident, no.

Q. That is what I say, limiting it. Sandburg discusses the same incident, does he not?

A. I don't recall.

Q. Calling your attention to page 279 of Sandburg—

* * * * *

729 That is a very close parallel of Dr. Eisenschiml, isn't it?

A. Yes, sir.

Q. And both, of course, are just merely reciting testimony, are they not?

A. There is the source reference to the War Department archives.

Q. Yes. Do you want to pass on, then, Dr. Riddle?

A. Yes, sir. The next reference is quote 23.

* * * * *

735 Q. Let's see if we can understand this, Dr. Riddle, so we can leave it and all go to lunch. As you read Dr. Eisenschiml's version here, including his photostat, you understood him to be stating as a fact what Fletcher testified to, isn't that true?

A. Yes, sir.

Q. Or some statement that Fletcher had made?

A. Yes.

Q. You understood further that that was a statement of historical fact?

A. Yes, sir.

Q. Isn't that so, and when I read Millard you understand him to be stating the same historical fact, isn't that so?

A. He does, yes, sir.

Q. And except for the part quoted, that it was "men riding on horseback that had shot President Lincoln", except for that you see no verbal similarity between Millard's treatment of the incident and that of Eisenschiml, is that correct?

A. Not verbal similarity. Paraphrastic similarity. 736 yes, sir.

Q. By that we mean, of course, that they both merely treat of the same historical incident in different words?

A. Yes, sir.

Q. Except for those noted, right?

A. Yes, sir, but Dr. Eisenschiml dug that out of the records.

Q. How do you know? He told you?

A. He gives the evidence, here it is, here is a picture of it.

Q. Oh, you mean taking that as true?

A. Yes, sir.

Q. You are simply believing what Eisenschiml says in his book there?

A. Yes, sir.

Q. Well, having dug it out of the records, did he present it to the world, did you understand that?

A. Yes, sir.

Q. As a scholarly finding?

A. Yes, sir. So, the simplest thing in the world for anybody to do working on this would be to look at this page and he would have it.

Q. And looking at it, if you looked at that page 737 as a scholar at a purported statement, a facsimile reproduction by a reputable scholar like Dr. Eisenschiml, if you saw that you would take that as being a true historical fact, would you not?

A. Yes, sir.

* * * * *

743 Q. Doctor, during the lunch hour did you make a comparison of language or a paraphrastic comparison between Sandburg's treatment of the John Parker incident and Dr. Eisenschiml?

A. I did, also Millard.

* * * * *

749 My conclusion with reference to quote 13 is that Millard's language is close to that of Sandburg, but that Millard's account contains material found in Eisenschiml but not found in Sandburg, so that I conclude that although there is close parallelism of language between Sandburg and Millard, the greater similarity is between Millard and Eisenschiml.

* * * * *

750 Mr. Martineau: Q. Would you just briefly, then, sum up wherein Millard is close to Eisenschiml? Can you pick those out without much trouble to yourself and sum it up for his Honor?

A. The key point is the use of the word "coarse" in the phrase in Eisenschiml, "violent, coarse and insolent language", and in Millard, "profane coarse and insolent language".

Q. You seize upon the word "coarse"—

A. That is not in Sandburg.

Q. That is No. 1?

A. Yes.

Q. Eisenschiml uses "coarse" and so does Millard, but Sandburg does not?

A. Correct.

Q. What is the next verbal similarity?

A. "Found asleep on a street ca[illegible]," exactly the
751 same in Millard and Eisenschiml.

I note, sir, that the same words also occur in Sandburg.

Q. That one is sort of inconclusive?

A. I withdraw it as inconclusive.

"The squawking of ducks" in Eisenschiml and Millard, not in Sandburg.

Q. Four words, "The squawking of ducks"?

A. Yes, sir.

Q. And Sandburg doesn't even have the idea in there?

A. No, sir.

Q. Or the words?

A. No, sir.

Mr. Gertz: The incident.

Mr. Martineau: The incident, yes.

Q. What is the next one, Doctor?

A. Well, those are all that I would wish to point out in the matter of language.

Mr. Gertz: On 13.

The Witness: On quote 13.

Mr. Martineau: Q. The idea of the squawking of ducks, I assume, was taken by Dr. Eisenschiml from the records of the Metropolitan Police Department which he cites here as authority?

752 A. So I also have assumed.

Q. That being, I suppose, Parker's alibi?

A. Yes, sir.

* * * * *

Q. In regard to 14?

A. In regard to quote 14. Give me a moment, please, to find it in Sandburg.

* * * * *

Q. Let me see if I follow you on this, Doctor. Sandburg and Eisenschiml are parallel almost to identical language there, aren't they?

A. Yes, sir.

Q. Millard has a complete absence of that?

757 A. Yes, sir.

Q. He doesn't mention the incident at all, does he?

A. No, sir. Well, the incident, not the detail.

Q. Yes, but I mean I don't quite follow you as to why you conclude that Millard is closer to Eisenschiml when he doesn't even use the language?

A. That is what our method of analysis is known as the argument from silence.

Q. In other words, you can't win in this game, can you? If you say something you are hung and if you are silent you are hung?

A. If you are comparing otherwise closely similar passages.

Q. All right, go ahead. I just wanted to understand the type of reasoning there.

A. Yes, sir. The third, however, is positive. In this incident it is the reference to Parker being kicked. Now, I will take it from Sandburg first.

I beg your pardon. It isn't there. Now, this is my point:

"Some weeks later Parker received a severe kick from a man he was attempting to arrest. His injuries required the visit of a police physician."

758 I now quote from Millard, page 108:

"After this Parker—stayed—off the Trial Board records. His name appeared only once when he was examined by a police doctor after being kicked by a man he was trying to arrest."

There you have an example of an item which is in Eisenschiml and Millard, but not in Sandburg.

Q. Yes.

A. Therefore I conclude with reference to quote 14 that the derivation is Millard from Eisenschiml, not Millard from Sandburg.

Q. I think we went into this very part of it at some length this morning, didn't we?

A. Yes, sir. Yes, sir. I take it now we have reference merely to the link furnished by Sandburg?

Q. That is right. I won't go into that again because we compared the identity, if any, of the language. So we can pass this, then, this morning you and I went into the question of whether there was any parallelism of language between Millard and Eisenschiml?

A. Yes, sir.

Q. So I won't repeat that at this time.

A. No. No, that is not relevant, as I understand it, 759 at this point.

Q. That is right, so we have got that covered anyway and we won't repeat it.

Have you got any more notes there?

A. Not to that point, either 13 or 14.

Q. Did you prepare notes similar to that, Doctor, when you were getting your testimony ready on the general case?

A. No, sir.

Q. Those are very helpful in testifying, aren't they?

A. Oh, yes. I had the equivalent, of course, in—

Q. Defendant's Exhibit 5?

A. No. 15.

* * * * *

761 Mr. Martineau: Q. Did you happen when you were making this last comparison, Doctor, to notice any differences between Millard and Eisenschiml in regard to this Parker business, John F. Parker?

A. No, sir, I didn't go into that.

Q. I see, just the likenesses?

A. I gave attention only to the Sandburg relationship.

Q. And you didn't go into any differences between Sandburg and Eisenschiml on that point either?

A. No, sir.

• • • • •

762 Q. Well, just to put it this way, and confining our attention to this Parker business we have been talking about, if Millard has some fact in regard to Parker, some alleged fact that Eisenschiml doesn't have, so we agree that as to that fact at least Millard must have got it from some other source?

A. Yes, sir.

Q. That doesn't appear in Eisenschiml?

A. Yes, sir.

• • • • •

Q. Shall we go on now, Doctor? You were about to deal with quote No. 24?

• • • • •

765 Now, going through our ritual, do you find any evidence that there is verbal parallelism of Millard to Dr. Eisenschiml? In other words, has he used, in your judgment, any treatment or expression copying?

A. It is not close verbal relationship.

Q. Not enough to—

A. I will accept the statement that you just made.

Q. It is not enough to be significant, the verbal part of it?

A. That is right.

• • • • •

766 Q. In other words, the factual situation indicates to you that Millard got this from Eisenschiml?

A. Yes, sir.

Q. But you find no verbal parallelism?

A. That is right.

Q. Or copying of expression?

A. That is it.

* * * * *

767 Q. Shall we pass on to your next one?

A. Yes, sir, ~~note~~ 29. This is the reference to Gobright. It is Millard, page 115, your Honor.

* * * * *

773 Q. If there is an idea that Millard has that is found in some other author but is not found in Eisenschiml, would you say that that indicated to you that Millard must have consulted this other source?

A. Yes, sir. You asked the same question before and I answered it in that way before and I answer it the same way now.

Q. We can agree on that, can't we?

A. Yes, sir.

Q. Let me call your attention to the matter of finding the derringer on the floor. Eisenschiml says, does he not, that it was Gobright who picked the derringer off the floor and found it, doesn't he?

A. Yes, sir, he says he found it.

Q. He found it on the floor?

A. And, obviously, he picked it up because, it goes on to say, that he gave it to Richards.

Q. That is right. Now, isn't it true that Millard says that somebody else found the derringer, this man named Kent?

A. That is right, sir.

Q. That is quite a serious difference, isn't it?

774 A. Yes, sir.

Q. Now, have you read Gobright on this subject?

A. No, sir.

* * * * *

775 Q. Millard has the name of this man Kent, doesn't he?

A. Yes.

Q. Gobright doesn't have that, does he?

A. No, sir.

Q. And, of course, Eisenschiml doesn't have it?

A. No.

Q. Because he doesn't mention it.

You have read Pitman, I am sure, have you not, Doctor?

A. Yes, sir.

Q. Do you recall the testimony of William Kent on page 82 of Pitman?

A. No, sir, I wouldn't say I recall it.

* * * * * *

777 Q. Don't you think we can agree that that is a rather serious discrepancy between Millard and Eisenschiml as to who found the pistol?

A. Yes, sir.

Q. And that would indicate to you, I am sure, wouldn't it, that Millard in this instance, at least, must have consulted either one or both of Gobright and Pitman?

A. Yes, sir, and I should add that it would indicate that he derived the reference to Kent from Pitman.

Q. Yes, sir. Is there any more you want to say about this incident?

A. No, that is all on that.

The next is quote 30. It is this same point, Mr. Martineau. It concerns the sending of the telegram.

* * * * * *

779 Q. Now, is there there, Doctor, any internal evidence in the four corners in the way Millard treats this quote which indicates to you that he lifted this from Eisenschiml rather than got it from the original source?

A. Not in the matter of language.

Q. But in the matter of ideas there is, is there?

A. In the matter of relationships.

* * * * * *

780 Q. Let's see if we can dispose of this with a few words, then. The New York Tribune for April 15, 1865, contained both wires, did it not?

A. Yes, sir.

Q. And those are matters of public record, then, are they not?

A. Yes, sir.

Q. As well as historical fact. Dr. Eisenschiml quotes the wire, the second wire, in this particular instance, does he not?

A. Yes, sir.

Q. Millard doesn't, although he gives the substance of it, right?

A. Yes, sir.

Q. Both purported to be treating of historical facts, don't they?

A. Yes.

Q. Now, the inference Dr. Eisenschiml draws from this second wire, you say, is that it was just another instance of Stanton's—give it to me in your words.

A. Being in control of the situation.

781 Q. Yes.

A. So that Gobright felt obliged to defer to him.

Q. Dominating Gobright?

A. Yes.

Q. Making him do what he wanted? That is the inference Dr. Eisenschiml draws?

A. Yes, sir.

Q. And you suggest that Millard draws the same inference although in other words?

A. Yes, sir.

Q. By saying that "Thereafter Gobright became just another meek and obedient puppet."

So can we agree that the fact stated is not one of those

unique facts of history which Dr. Eisenschiml discovered, but the inference he drew from it was unique?

A. Yes, sir.

Q. That is the point, isn't it?

A. Yes, sir.

Q. And Millard drew the same inference?

A. Yes, sir.

Q. Have you concluded with that one now?

A. Yes, sir. The next is 31.

783 Q. In other words, to you as a literary man, there is nothing that you would regard, as far as the language itself is concerned, as significant?

A. The language, but here is the heart of the whole matter.

Q. All right, let's have at it, then.

A. Here is a fact which establishes the high degree of probability that Stanton was implicated in the assassination plot. The telegraph lines went dead. They were in charge of the War Department. Only Stanton could have done that. Now, that is a fact which Dr. Eisenschiml brought to light, used in his unique generalization of the complicity of Stanton, a very startling historical generalization.

Now, I find Mr. Millard using that same generalization. It is one of the discoveries of Dr. Eisenschiml. It will be forever attached to Dr. Eisenschiml's name.

784 Q. Let's see if we can briefly analyze it now. Your reference is to Dr. Eisenschiml's generalization drawn from a certain historical fact?

A. Yes, sir.

Q. Now, the historical fact is that the wires, every commercial telegraph line out of Washington, went dead and remained dead for nearly two hours?

A. Yes.

Q. The breaking off of telegraphic communication?

A. Yes.

Q. That is the nubbin of the historical fact, isn't it?

A. Yes.

Q. Which fact was never satisfactorily explained?

A. Yes.

Q. According to Dr. Eisenschiml, right?

A. Yes.

Q. Now, as to that fact alone, before we get to the inference stage, the inference Dr. Eisenschiml drew, was not the fact known by all?

A. Yes.

Q. But the inference Dr. Eisenschiml drew, you say, had never been drawn by anybody else?

A. Yes.

* * * *

786 Q. No. I mean, we can agree that the fact of the severance of the wires was known to all the world, wasn't it?

787 A. Yes.

* * * *

789 Q. Have you read this book "The Great American Myth," Dr. Riddle?

A. No, sir, I have looked at it, but I have not read it through.

Q. By George S. Bryan? Is that a work of good authority?

790 No, sir. The reason I haven't read it is that it is a very second-rate rehash and I didn't bother to read it. I have examined it.

Q. It has that reputation, does it?

A. I satisfied my mind about it. Yes.

Q. I notice here on page 225 that this book, "The Great American Myth" gives a verbatim quote of the testimony of Eckert on the subject of the cutting of the telegraph wires, do you recall that?

A. Yes, sir. Doesn't he say "There was a slight interruption"?

Q. You seem to be smiling.

A. Yes.

Q. Don't you think the author was being sarcastic there?

A. Yes, bitterly sarcastic. Yes, sir.

Q. It is a pretty effective understatement, isn't it?

Mr. Gertz: That is what he meant about a second-rate rehash.

Mr. Martineau: Q. You mean it is a second-rate rehash to indulge in irony, to call it a slight interruption, an interruption of three hours?

791 A. Any interruption in the capital city in war time would hardly be slight.

Q. Let me understand. You mean by a rehash that this author repeats other historical facts?

A. Yes.

Q. That other authors have printed before?

A. There is no indication of any individual work done by Bryan at all.

* * * *

793 Q. In other words, if I understand the historical reasoning involved here, the cutting of these telegraph wires would have made it extremely easy for the conspirators to escape?

A. Yes.

Q. And that could only be done by the connivance of some person higher up?

A. Yes.

Q. And it was suggested that that higher-up person was the all powerful Secretary Stanton?

A. Yes, sir.

Q. And I put it to you, Doctor, that many times before Dr. Eisenschiml the main thesis, namely, that the

escape of the assassins was aided by one means or another by persons higher up in the government, was mentioned by other authors before Dr. Eisenschiml?

A. Yes, sir, I think you are right.

Q. Isn't that true?

A. Yes, I think you are right.

Q. For example, I give you Lloyd Lewis in "Myths after Lincoln," page 223—you recall that?

794 A. Oh, yes.

* * * * *

795 Q. The only thing I suggest to you there, Doctor, is that other historians before Dr. Eisenschiml had suggested that someone in the government was mixed up in the escape of these murderers.

A. Two points. First, what was the date, would you refresh my memory as to the date—

Q. Yes, sir, I think it is 1929. Yes, copyright 1929 by Harcourt Brace & Company.

A. Yes, sir, that places it before the Eisenschiml work.

* * * * * *

796 Q. Don't you think that it is fair to say that there Lewis is sort of putting a finger, so to speak, on Stanton?

A. But not in connection with the interruption of telegraphic service.

Q. But can we agree that the interruption of the telegraphic service would come under the heading of the case with which the murderers had escaped?

A. Oh, yes. Yes.

Q. It was the main feature of the ease with which they escaped, wasn't it?

A. Yes.

Q. What you mean, Doctor, is that there is no particular pinpointing?

A. Yes.

Q. By any prior historian?

797 A. Yes.

Q. Of the snapping or the breaking of the telegraph communication?

A. Yes.

Q. As far as you know?

A. Yes.

• • • • •

799 Q. Do you want to say any more about quote 31?

800 A. No, sir. The next is quote 32.

• • • • •

803 Q. Well, Dr. Riddle, can we agree that Millard, here, did not indulge in any treatment or expression copying of Dr. Eisenschiml?

A. Yes, sir.

Q. What do you say about this?

A. This is one of the cases of general parallelism.

Q. In other words, what he did do was to express the same ideas in different words?

A. Yes.

• • • • •

804 Q. Do you regard that as a parallelism of idea?

A. Yes.

Q. Of course, it is something perfectly obvious to—

A. Yes, each is drawing a conclusion. It is a similar conclusion.

Q. Yes. I mean, it is a pretty obvious conclusion, isn't it?

A. Oh, yes.

Q. You wouldn't say there was anything unique about that drawn by either one, would you?

A. Oh, no.

• • • • •

805 Q. The common source being the actual telegrams themselves in the official records, isn't that true?

A. The telegram is part of the common source.

Q. Yes.

A. The official records. Of course, that is readily available.

Q. And there is nothing in the four corners of Millard's treatment of this incident which suggests to you that he lifted from Eisenschiml rather than getting it from the common source or from some other author, is there?

A. Yes, sir, I think there is, namely, that this again is part of the indications collected by Dr. Eisenschiml to suggest that Stanton was involved. It is not what was used, but the use made.

Q. I see. In other words, we can agree then, that looking at the thing, the incident within its four corners, there is no parallelism of language or internal sequence of
806 ideas, but in the grand manor in which Dr. Eisenschiml used it as part of his grand thesis that Stanton was mixed up in this thing, it fits in there and there is where you regard it as significant?

A. Yes, sir, exactly.

* * * * *

Q. Will you get to the next one, then?

A. 33, immediately following. That is the Lloyd quote, Millard, page 116.

* * * * *

808 Q. That is the end of the quote from Dr. Eisenschiml?

A. That is the entire paragraph, yes, sir.

Q. That, incidentally, is the same as quote No. 46, I believe? Let's make sure if it is.

The Master: No. 46.

Mr. Gertz: It is substantially the same.

The Witness: Now, at the end of the inner quote Dr. Eisenschiml gives "Footnote 23, Pitman, work cited, page 86."

Mr. Martineau: Q. Now, can we agree that except for the purported quotation of the testimony of Lloyd, that Millard does not indulge in treatment or expression copying of Dr. Eisenschiml's language?

A. Yes.

Q. The quotation from Lloyd is, as Dr. Eisenschiml
809 points out an exact quotation of Lloyd's testimony according to Pitman, isn't that true?

A. Yes.

Q. And you have read Pitman?

A. Yes.

Q. That is Pitman, page 86?

A. Yes, sir.

* * * * *

812 Q. In other words, if we just look at the quote alone, that would not indicate to you that Millard had got it from Eisenschiml rather than the common source, Pitman?

A. As to the quote alone, no, it would not.

Q. But because Millard drew an inference from that, which inference you say was the same in substance as the inference drawn by Dr. Eisenschiml, that suggests to your mind that he must also have copied the quote from Eisenschiml rather than Pitman?

A. Yes. Yes.

* * * * *

813 Q. Do you know of any other author that suggested before Eisenschiml that there wasn't any plot against any other members of the cabinet, other than Seward and Lincoln?

A. Mr. Martineau, please don't understand this as a complaint. I can only say I am somewhat fatigued now so that the only answer I could give to your question is that I do not recall any such.

* * * * *

817 Q. That took us to 33, Doctor.

A. One more, 34. That is Millard, page 117. It looks as though we are going to end with dear old Parker, another reference to Parker: "John Parker had vanished after the assassination."

• • • • •

Q. Now, do you find there, Doctor, anything which suggests to you that Millard indulged in expression or treatment copying from Dr. Eisenschiml's treatment of 820 quote 34?

A. Yes, sir.

Q. Would you point that out, please, Doctor?

A. Yes, sir, three words, "was promptly discharged" with reference to Lizzie Williams.

Q. Yes, and that is the extent of the treatment or expression copying?

A. There is, of course, the reference to Lizzie Williams being brought into headquarters.

Q. Well, that, of course, would be a mere statement of parallelism of fact as distinguished from expression, wouldn't it?

A. Yes.

Q. But the words are only "was promptly discharged"?

A. Yes.

• • • • •

821 Q. We can agree that the facts discussed by both Dr. Eisenschiml and Mr. Millard in this quote 34 are facts of history, can we not?

A. Yes.

Q. That a common source might be the record of the Metropolitan Police Department?

A. Yes.

Q. Doesn't Carl Sandburg discuss this same windup of John Parker?

A. Yes, he does. I noticed that as I was working on that during the recess.

• • • • •

822 Q. Now, Sandburg uses the identical verbal parallelism, does he not?

823 A. The three words.

Q. "Was promptly discharged"?

A. He does.

• • • • •

The Witness: One matter which I should mention, Mr. Martineau, is the reference common to Eisenschiml and Sandburg to the police blotter. There is no reference to the police blotter in the Millard article.

Mr. Martineau: Q. Well, that would be, then, a difference in verbiage, wouldn't it?

A. No, sir, to me it would indicate that Sandburg was closer to Eisenschiml—

Q. Oh, I see.

824 A. —than to Millard.

Q. And would that indicate to you that Millard lifted from Eisenschiml rather than from Sandburg?

A. So far as that goes, yes, it would so indicate.

Q. I mean, is that one of those language of silence type things which you mentioned before?

A. Yes.

That is the most important item that I can see, Mr. Martineau.

Q. In other words, both Sandburg and Dr. Eisenschiml refer to the police blotter as the source and Millard doesn't?

A. Yes.

• • • • •

829 Mr. Gertz: That is the end of it, that is right. I want the record simply to state that we contend

without having to prove that he is an American Citizen from birth.

The Master: You have got that in the record now.

Mr. Gertz: I am through. Fine.

Mr. Martineau: That is right.

The Master: He is entitled to a copyright.

Mr. Martineau: There is no question about that.

Mr. Gertz: The reason I went through this at great length was because they disputed the citizenship. I don't have to prove it.

Mr. Reuben: We never thought it was germane.

Mr. Martineau: We simply said that we had no knowledge—

Mr. Gertz: It is germane under the statute. It is an element of copyright. Under the statute you either must be a citizen, a domiciled alien or a subject of a country giving reciprocal rights to an American.

Mr. Reuben: There was an executive order so the citizenship wasn't germane.

Mr. Gertz: Okay, but I wouldn't want the implication in the record that Dr. Eisenschiml from birth isn't 830 an American citizen.

The Master: Now you have got that stipulation.

Mr. Gertz: That is fine, we have saved an hour's time.

Mr. Martineau: We have the greatest respect and admiration for Dr. Eisenschiml, but we can't stipulate to anything other than what we stipulated.

Mr. Gertz: He is a rare person in that respect, too, that even though he didn't come to this country until he was twenty-one, he was born an American citizen.

Mr. Martineau: What you are saying now is not evidence.

835 Q. And is that on the probability theory?

A. Yes, sir, in this way. As I regarded if, these

extended references establish a literary relation. The problem then becomes "What is that literary relation?" In each case there is a source reference made by Dr. Eisenschiml and the question then is "Did Mr. Millard consult that same source reference?"

In my judgment, he did not. With reference to the two quotes which involve the O'Beirne papers, he could not have done so because those papers are in Dr. Eisenschiml's possession. With reference to the Crook quote—

Q. Which one was that again? That was No. 1?

A. Yes, "Crook, do you know"—

Q. Yes, I have it.

A. And also "I have perfect confidence," et cetera.

Q. That was Nos. 1 and 2?

Q. Yes. It was at that point that Mr. Gertz suggested that you ask me why. I say the reason was
836 that it would be a waste of anyone's time to go to the original source when it was fully quoted with full credit given in Dr. Eisenschiml's book.

Third, for Mr. Millard to have gone to those sources not in Dr. Eisenschiml's possession would have meant several journeys of varying distances which, in the nature of the case, as I know how books are written, it would have been so impractical for Mr. Millard to have done that, that I concluded that he did not do it.

I may give an illustration. I am now just finishing a book on "Lincoln's Career in Congress." Now, that is a problem much smaller in scope than the problem of the assassination. To accomplish what I needed to do in writing that book, I visited fifteen libraries and source collections. It involved going to Washington, renting a house, staying there for five weeks at considerable expense to me. My estimate is that already I have spent in cold cash $3,000 on the research on that book.

Now, that is my basic reason for considering it so

improbable that Mr. Millard consulted the sources, even
837 those which would be relatively readily available.

I am confident on the basis of that reasoning that he did not.

Q. In other words, Doctor, does this fairly sum it up, that's the core of your reasoning that he did not is that it would have been too much trouble to do so when he could take it on good authority from Dr. Eisenschiml?

A. Yes, sir.

Q. Does it get down to that?

A. Yes, sir. Incidentally, that is the reason why I never read Crook.

Q. In other words, you recognized Dr. Eisenschiml as a reputable scholar and if he quoted something, then that would be enough—if he vouched for it as being correctly quoted, that would be enough for you, as another reputable scholar?

A. Yes, sir.

Q. And so you would assume that Millard would do likewise?

A. Yes, sir.

Q. That would not apply, would it, Doctor, that reasoning, if Millard himself had any given original source
838 in his possession and did not have to make such a long trip or have such expense?

A. No, sir.

Q. I mean, that reasoning then would not apply to that particular situation, would it?

A. No, sir, it would not.

* * * * *

848 Q. Would that indicate, Doctor, that Millard consulted Bates?

A. No, sir, it would not.

Q. Well, you wouldn't rule out the possibility that he did, would you?

849 A. No, sir, I would not rule out the possibility, sir.

Q. How about the probability?

A. And I would say I do not think there is a degree of probability.

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850 Q. It wouldn't be unusual, would it, for a person writing an historical paper, or what is supposed to be an historical paper, when he looks at something one student says about a purported letter quoted verbatim and then he sees a facsimile of it and he believes the facsimile must be a truer and fuller version of that letter?

A. That would be a normal reaction, yes, sir.

Q. In other words, that is getting back to the original evidence?

A. Yes, sir.

Q. And that could very well have happened here? It is possible it could have happened here, when Millard quoted Mrs. Lincoln's letter to O'Beirne, on that letter he could have looked both at Eisenschiml and Sandburg and probably in Eisenschiml he saw more full verisimilitude in the letter?

A. Yes, sir. And I am very willing to add, Mr. Martineau, I haven't the slightest doubt that Mr. Millard read Sandburg.

* * * * * *

855 Q. So that is this a fair summation of it, then; Poore has it in his book, Pitman does not have it in his book, but it does appear in the original handwritten notes of Fletcher's testimony, a facsimile of which is in Dr. Eisenschiml's book, and isn't it conceivable that Mr. Millard may have got that quote from Poore rather than from Dr. Eisenschiml?

A. I would say that it is conceivable, but very doubtful.

Q. Is it possible?

A. It is possible, but very doubtful.

Q. Why do you say it is doubtful, because of the other factor you mentioned before?

A. No, sir. Poore is not as accessible as Crook or Bates. It can be obtained, but it seems to me to be not the kind of book that an author of an article, a book-length article would take the trouble to turn up.

Q. Let me put this to you, Doctor. You are discussing now your theory of probabilities?

A. That is right.

Q. Now, if Mr. Millard had testified that in this instance he did examine both Pitman and Poore and
856 Dr. Eisenschiml, would that cause you to change your opinion as to probabilities?

A. I would certainly act on the presumption that a witness in a legal case, under oath, would tell the truth and I would believe him.

Q. Yes. In other words, is this a fair statement, then, that with a witness under oath, as you have testified, that was the thing, a thing like that, that would in your judgment outweigh your theory of probabilities?

A. Yes, sir. I would have to take his word for it and would cheerfully do so.

Q. Thanks.

Now, will you turn briefly to item No. 7 on Plaintiff's Exhibit 16?

A. That is "No, sir. It did not." Oh, that is the telegraph again.

Q. Yes.

A. Millard, page 115, column 2, paragraph 3.

* * * * *

858 Q. Well, now, do you see there any internal evidence within the four corners that Millard got that from Eisenschiml rather than from the original source, or do we rely here on the probabilities factor that you men-

tioned before, "It would be much easier to get it from Eisenschiml", et cetera?

A. That is it. I see no inherent evidence.

Q. Fine.

And Dr. Eisenschiml himself exactly paralleled, of course, the language of Major Eckert, as reported, didn't he?

A. That is what I assume, since he indicated no change.

Q. Now, would you turn briefly, Doctor, to item No. 7 on Plaintiff's Exhibit 16?

A. Yes, sir.

* * * * *

Q. Now, let me put the usual question to you: Is there anything which indicates to you here, from the internal evidence within the four corners, that Millard derived that exact purported quote of Lloyd's testimony from Eisen-
861 schiml rather than from Pitman or some other original source?

A. No.

Q. Other than that probability that you mentioned, that it would be much easier for him to get it from a reputable scholar like Eisenschiml?

* * * * *

863 Q. I will read this for the context:

"Lloyd was also something else at the time, something that surrounds his whole glib testimony with the distinct odor of fishiness. Lloyd was, all that afternoon and evening, as drunk as a lord—falling-down drunk—far too drunk to be reliable about anything.

"'I was right smart in liquor that afternoon,' he admitted under cross-examination, 'and after night I got more so.' His sister-in-law, Mrs. Offutt, added that Lloyd was so drunk he became sick when he lay down. His method of curing this was to get up and drink some more."

Now, there is no suggestion of anything like that in Eisenschiml's quote, is there?

A. No, sir.

Q. Therefore, if that appears in the original source, Poore or Pitman or some other original source, would
64 that indicate to you that Mr. Millard must have got such information in that context from that original source?

A. I would still say so with reference to the matter of the plot involving other cabinet members. With reference to the quote, I would say "No."

* * * * *

65 Q. Well, could you agree to this, that it would indicate to you, as a fair-minded scholar, that it is probable that Millard may have read from Pitman or Poore or both the entire testimony of John Lloyd?

A. I should say that would indicate the probability that he did, yes.

Mr. Gertz: Jack, in order that we may make it clear,
67 this is predicated on the supposition that that language about drink is not in the Eisenschiml book?

Mr. Martineau: Yes.

* * * * *

68 Q. (Interposing.) In other words, let me put it to you this way: That testimony of Lloyd's, in other words that business of "I was right smart in liquer"
69 and all that, that is separated by some 113 or 114 pages in Dr. Eisenschiml's work?

A. Yes.

Q. A different subject or context, I presume?

A. Much in between, yes.

* * * * *

Mr. Martineau: I notice that Pitman and Eisen-
70 schiml have it spelled "l-i-q-u-e-r". Right, Doctor?

A. Right.

Q. And Millard and Poore have it spelled "l-i-q-u-o-r"?

A. Yes, sir.

Q. Where does that leave us?

A. Who knows?

* * * * *

879 Q. Now, let us get briefly to Item 11 on this Plaintiff's Exhibit 16.

A. Millard, page 120, column 1, paragraph 2.

Q. Yes, sir. Now, Millard says there, as I recall it—I will save your voice here:

"When news of this reached Edward Bates, the former Attorney General, he cried in horror, 'If he be, in the lowest degree, qualified for his office, he must know better.' Afterward he called Speed's opinion, 'The most extraordinary document I ever read, under the name of a law opinion * * *.'"

* * * * *

880 Q. And is there anything there which by internal evidence suggests to you that Millard obtained his quote from Bates' Diary from Eisenschiml instead of from Bates' Diary?

A. No.

* * * * *

882 Q. In other words, there we have another situation where Dr. Eisenschiml and Millard both gave exact parrallel quotes from the opinion of Orville Browning?

A. Yes, sir. There is, however, an added factor as distinct from the preceding identical quote. Mr. Millard's parallelism extends to words "not derived from the Diary" but which exactly parallel Dr. Eisenschiml's book, namely—

* * * * *

884 A. In the statement identifying Browning, "Orville Browning, later Secretary of the Interior", those are exactly the same in Millard and Eisenschiml.

Q. Well, isn't that just a matter of what we lawyers call "descriptio personae"? I mean, there is nothing very unique about that? It is just telling you who it is?

A. It does tell you who the man was, but there it is.

* * * * *

Now, with reference to the probability factor, there is also a distinction to be drawn between the quotation from Bates and the quotation from Browning. Bates' Diary is
readily accessible. The Browning Diary was published
885 in a much more limited edition and, although it is
not hard to get at, it is a matter of degree. It is a rarer book than Bates.

Q. But it is available in the library in New York?

A. New York.

Q. The American Historical Society Library?

A. Oh, yes, it is available, but there is a difference in the degree of availability. You see, the Diary of Bates was published by the American Historical Society and it was given a large publication. The Diary of Browning was published by the Illinois State Historical Society, with a much more limited distribution. That is the only point I wish to make and I am not emphasizing it to any extent.

Q. I call your attention to the fact that I hold in my hand, if you permit me, the Diary of Orville Hickman Browning, Volume 2, from the Chicago Public Library.

A. Oh, yes, certainly, but—

Q. And so you couldn't call it a rarity?

A. No. I am just calling your attention to a difference of degree of availability and I concede that the Browning
Diary, as well as the Bates Diary, is readily, easily
886 accessible. I am just mentioning the difference of
degree.

Q. But you think because of the other factor you have mentioned, the probabilities are that Millard consulted Eisenschiml and not the original source?

A. Yes, sir.

* * * * *

888 Q. Now, I think we have got to No. 13.

A. That is the last. Millard, page 120, column 2.

paragraph 2, beginning with the words "Upon consultation".

Q. Shall I read Millard there and save your voice?

A. Fine.

Mr. Martineau: Right at the third line from the top, your Honor. (Reading:)

"The response to his insistence came from the State Department in a dispatch that said flatly, 'Upon a consultation with the Secretary of War and the Judge Advocate General, it is thought advisable that no action be taken in regard to the arrest of the supposed John Surratt at present.'"

The Master: Was that on page 120?

889 Mr. Martineau: Yes, sir. Page 120, right at the top of column 2.

The Master: Oh, yes, I have got it.

The Witness: The Eisenschiml reference is a quotation with skip marks on the dispatch, as follows:

"'Sir: Your dispatches * * * have been received. In reply to your number 538, I have to inform you that upon a consultation with the Secretary of War and the Judge Advocate General, it is thought advisable that no action be taken in regard to the arrest of the supposed John Surratt at present. Signed, W. Hunter, Acting Secretary.'"

By Mr. Martineau:

Q. In other words, Dr. Eisenschiml has a part of—he quotes a part of that posted dispatch?

A. Yes.

Q. Which Millard leaves out, doesn't he?

A. Yes.

Q. So that, to that extent, they are not precisely identical?

A. No.

890 Q. Now, is there anything there, Doctor, which by the internal evidence indicates to you, aside from this probability factor, that Millard lifted this quote from Dr. Eisenschiml rather than getting it from the original source, Oldroyd?

A. As to the quotation which is identical, no. As to the source relationship, yes.

Q. By that you mean, Doctor, that probability thing you were talking about?

A. Yes.

The source here is the House of Representatives, 39th Congress, 2nd Session, Report No. 33.

That presents a little job for a researcher to go to the Congressional Library. You can't get that sent to your cubicle. You have to go to the room where it is and hunt it up there. It takes a little doing, I know, because I had to do it myself.

Q. But if a scholar were down there, he could do it?

A. He could do it.

Q. That is the Library of Congress, is it?

A. Yes.

891 Q. Well, this same dispatch is quoted verbatim in many other authorities, is it not?

A. That I do not know.

Q. To refresh your recollection, is it not quoted verbatim in Oldroyd, which you say you have read?

A. I cannot say. I don't know. But if you have it there--

Q. I will call your attention to page 228 of Oldroyd, to this language. I will read a little bit ahead of that, to give you the context:

"Surratt being in Liverpool on the 26th, according to the evidence given by the person who accompanied him from Canada, and sworn to before a justice of the peace for the burough of Liverpool on the 26th, ought to have

been, in my opinion, sufficient grounds for his arrest; but it was not made. On October 13 W. Hunter, Acting Secretary of State at Washington, cabled the vice-consul at Liverpool:

"'I have to inform you, that, upon a consultation with the Secretary of War and the Judge Advocate General,
892 it is thought advisable that no action be taken in regard to the arrest of the supposed John Surratt at present.'"

Now, Dr. Riddle, with the exception of the words "I have to inform you that", what I read is precisely the same as what Millard has, is it not?

A. Yes, sir.

Q. So that it is probable that Millard got his quote from Oldroyd, isn't it, or conceivable?

A. It is conceivable.

Q. Well, would you say it was probable?

A. No, sir, I do not think it is probable.

* * * * * *

893 Q. Doctor, let's discuss for a minute this probability theory, and in discussing it, in order that we can understand what it is all about, may we—is it fair to eliminate from the calculation or discussion the idea of verbal parallelism and just to treat of the; what you call, I believe, the "parallelism of the historical events" and the way in which each of the opposing authors treated of those events?

A. I believe we could do that quite intelligently.

Q. I mean, is that a practical way to do it?

A. Yes, understanding that I shall not refer to anything involving identity or close similarity of language.

Q. That is right. We just want to get your theory of probabilities.

A. As I was saying, everything, meaning everything that is treated in the Millard article is—Well, let me start over.

Of these matters in the Millard article and the Eisenschiml books, there are these matters in which the
894 Millard article parallels, again referring to literary parallels, the content of the Eisenschiml books, the conclusions which Dr. Eisenschiml draws, the generalizations which he makes and the ultimate findings of his books.

Now, those do not appear in such books as Clara Laughlin or Oldroyd or Townsend. Those books are standard stories of the assassination from the point of view that was current before Dr. Eisenschiml did his work. True, many of the incidental historical facts appear in them, but the individual and unique generalizations of Dr. Eisenschiml do not appear in them, so that when I analyze the article and find close similarity of these statements of historical fact and the close similarity of conclusions drawn from these facts and the generalizations which Dr. Eisenschiml made, then I take it that that establishes a degree of probability that, since what Mr. Millard wanted as a writer was readily before him in the books, that it is highly improbable that he spent much time, made much effort or spent much money getting at those other sources.

Now, Mr. Martineau, I have always tried to confine my testimony to that of an expert using a technique
895 of literary analysis. I find these parallels. That is the conclusion to which I come.

I also perceive that Mr. Millard read and used other books than Dr. Eisenschiml's. Of course he did. Anyone would. It is perfectly proper that he should do so.

Q. And likely and probable that he did do so?

A. Yes, and proper that he should do so, but as far as this analysis is concerned, that is extraneous, when I find that use of materials, which materials are uniquely the product of Dr. Eisenschiml. That indicates that high degree of probability, and still I speak purely with refer-

ence to the method of analysis that I have followed, which indicates, I believe, a high degree of probability that he used the Eisenschiml books and that in these instances he did not use others.

That is my point, Mr. Martineau.

Q. Let me see if I understand you.

I understood you to say just a moment ago that it was probable that he did use other sources of material?

896 A. Yes.

Q. Other than Dr. Eisenschiml?

A. Yes.

Q. Well, do you still stand by that?

A. I tried to imagine how a writer of popular articles would proceed. You see, I have no experience. Assuming that Mr. Millard is a capable writer, as I do assume, surely he would have read Sandburg, for example. Any sensible person would.

I can see other items here in which I can perceive a degree of probability that he used this or that book. For instance, the "Grant Memoirs". He would have to use those things to get his background. Then when he goes to his work, there it is, cut out for him. Either he goes to the sources or he finds the materials from secondary sources.

Well, here it is, in these two volumes, and much in these two volumes is to be found nowhere else.

Q. Well, tell me this. Would a conscientious scholar or writer, assuming that he read Dr. Eisenschiml's books initially, as you did, and became struck with the the-
897 ory, would it be conceivable that a conscientious writer or researcher would, guided by Dr. Eisenschiml, read the original sources and check up on them? Do you think that is probable?

A. Well, Mr. Martineau, we encounter this factor of "How much could this writer afford to do?"

Now, please do not think that I am exercising a prejudiced view toward Mr. Millard. I am trying merely to parallel the illustrations that I may form myself.

For example, I did not write a popular article. I wrote a scholarly article. I do it to enhance my reputation as a scholar. I make no money from it. I am often amused at the amount I get from royalties, but I do it. Now, what could the writer of a popular article afford to do? Let me illustrate that. In writing my book, I had to find the "Diary of Joshua Giddings". It took me a long time to find where it was. I finally found this work at the Archeological and Historical Library in Ohio. I closed up the house in Hinsdale, got in the car with my wife, went to Columbus, I looked up the Diary and came back.

I imagine it cost me $100.

898 Now, to take an example from Millard's article, he makes a reference to the ultimate source, the Albert Galatan Riddle papers. Now, I ask myself, "Is it likely that Mr. Millard would have made the trip to Cleveland?" I don't know where Mr. Millard lives. Is it likely that Mr. Millard made the trip to Cleveland to consult those sources? Unless he was close to Cleveland, it would have been a difficult matter, taken time and cost money. Could he afford to do it?

You see, those are factors in the probability.

Q. In other words, if I understand you correctly, you are there saying in substance that Mr. Millard couldn't afford to be literarily honest; he had to be a crook?

A. Oh, no, sir.

Q. That is what it amounts to.

A. Oh, no, sir. I expressly said that I said it without prejudice to Mr. Millard.

Q. Isn't that the ultimate thrust of your argument?

A. Oh, no, no. I say that it is a question of whether

you go to the source or whether you go to the book
899 that contains it, that is handy and accessible, because it is easier and cheaper. It wouldn't be dishonest.

Q. It would be perfectly proper from a scholastic standpoint, wouldn't it—

A. Yes.

Q. —for Millard to have, let us say, taken the word of a reputable scholar like Dr. Eisenschiml or Albert Galatan Riddle's papers, that said so-and so?

A. Yes.

Q. There is nothing scholastically dishonest about that?

A. Nothing at all. The only point there, a scholar would of course give the source reference and the credit and the popular author should certainly give the credit, if not the source references. I can see why he wouldn't give the source references.

Q. Let me ask you this, Doctor. Assuming that in his original manuscript, Joseph Millard—and I just want to look at it from the standpoint of the author, Joseph Millard—in his original article he did give Dr. Eisenschiml credit as being a great authority on the assassination of Abraham Lincoln, would that in your opinion be the type of credit you are speaking of, which you could
900 give in a popular article?

A. Yes, and I assume that Mr. Millerd is a reputable author and he probably did.

* * * * *

901 Q. Now, we did discover in our joint search here that there were certain instances where Millard differed from Dr. Eisenschiml, didn't we?

A. Yes.

Q. Where he contained things found only in the original source, which Dr. Eisenschiml had not put in, do you recall that, and you said—I can't think of that one right now, but I am sure the record will show.

Mr. Reuben: Kent.

Mr. Martineau: Q. In regard to the incident where the pistol was picked up from the floor as to who picked it up.

The Witness: A. Yes, I recall that.

Q. I just use it here as an example of the differ-
902 ences found. In the probability theory you have been discussing, I asked you to set forth the differences between the two contending articles or works as well as the likenesses which we have been discussing now for several days.

A. Oh, yes.

Q. But you did not do that, did you?

A. With that exception, I did not find them.

Q. You found no differences at all?

A. No, not in the parallel passages.

Q. Not in the parallel passages. But outside of the four corners of the sixty-six parallel passages, if you will let me use that number, which we have in the quotes or the original eighty-five which you had, outside of those did you not set forth any differences between Millard and Eisenschiml?

A. I set none forth, but of course I observed them. You go through the article and there are spots which I have not underlined. Obviously those are not involved in the parallelism.

Q. Now, you say you found sixty-six parallelisms?

Mr. Gertz: He found eighty-five.

Mr. Martineau: Q. Or you found eighty-five?

903 A. To be certain, I entered the marks on the margin and counted them up.

Q. You say you found these eighty-five parallelisms in an article of some twenty thousand words, I believe the Millard article is. Supposing you had found two hundred differences. Would that have been significant in this probability theory you have enunciated?

A. I suppose, Mr. Martineau, that differences are to be found in the articles and presumably—here is my presumption. You see, that would indicate either original contributions of Mr. Millard or similar derivations from other sources, and please bear in mind I am assuming legitimate derivations.

Q. Oh, yes, we are assuming that. But you are not looking for differences; you are only looking for similarities between the two?

A. Right, right, although I noted such differences as there were, wherever the parallelism occurred.

Q. Within the parallelism itself?

A. Yes. Those are indicated by broken lines, as distinct from the straight lines.

Q. But aside from such internal differences as might
904 have existed in the parallelism itself, in the four corners, you did not make any notation of the other differences?

A. No.

Q. Would that have been significant?

A. No, I do not think so.

Q. In other words, the only thing that counts are just the likenesses?

A. That is what I was looking for, within the passages that appear to be similar, because they are the passages I am really concerned with.

Q. Well, believe me, I don't mean to fence with you. You were not looking for differences?

A. No.

* * * * *

910 Q. What I was getting at, Doctor, is, is it fair to say that the announcement of Dr. Eisenschiml's theories caused considerable discussion among scholars of the Civil War?

A. Oh, yes, yes.

* * * * *

911 Q. This fellow Bryan—is that his name, Elmer?

Mr. Gertz: George S. Bryan.

Mr. Martineau: Q. George S. Bryan that wrote the book "The Great American Myth"—in scanning through that I notice that he sort of belongs to the traditional school, doesn't he?

A. Yes.

* * * * *

913 Q. Yes. Now, except for the O'Beirne papers which were in Dr. Eisenschiml's exclusive possession and the Camden & Amboy timetable, which I think you said or the book says was discovered by Dr. Eisenschiml after considerable research, and the Metropolitan Police blotter, which although available to the public, was dug up, we might say, by Dr. Eisenschiml after some research, except for those three things are not the other sources in which he researched all available to the general public?

A. Yes, sir.

914 Q. Would it be fair to say that the original evidentiary facts which are peculiar to Dr. Eisenschiml are the O'Beirne papers, the Camden & Amboy timetable, and the Metropolitan Police blotter? Those were the evidentiary facts which he dug up from which he drew his original inferences, do I state that correctly?

A. That is correct, as applies to primary sources.

Q. That is what I mean.

A. Yes, sir.

Q. In other words, would this be a fair statement: that with those original evidentiary facts which you say Dr. Eisenschiml dug up, the ones we have just listed, he used those as a sort of a touchstone to apply to the other known facts as part of the public domain and came out with his new and original theory?

A. Yes, sir.

* * * * *

915 Q. In other words, let's put it this way: After Dr. Eisenschiml points the way as a scholar in his book and cites these newspapers that you refer to, then any other scholar may, if he wishes, go and examine these sources in the Library of Congress or newspaper offices or what have you, is that fair to say?

A. Yes, sir.

Q. Whereas that does not apply to the O'Beirne papers or the Camden & Amboy timetable?

A. True, nor does it any longer apply to the records of the Metropolitan Police.

Q. You mean, because Dr. Eisenschiml now has those in his exclusive possession?

A. No, sir, because they are not in existence.

* * * * *

917 Q. And I want to be perfectly fair to everyone, to my worthy opponent, too, and that is this: that after Eisenschiml points the way, and I give him full credit for pointing the way, then other scholars can follow in his footsteps, and if they choose, check up on these other original sources and read them with their own eyes, can't they?

A. Yes, sir.

* * * * *

925 Mr. Martineau: Q. Doctor, have you finished your statement concerning the original findings of Dr. Eisenschiml?

A. I have finished it in the sense of hoping that the instances that I received would be sufficient.

Q. Here is what I was getting at. Without refreshment of your recollection by examining the books you are not able to state, are you, which facts were found or stated for the first time by Dr. Eisenschiml and not by any prior author?

A. To answer that competently I certainly would have to consult the books and make notes, Mr. Martineau.

Q. For example, on direct examination Mr. Gertz asked you a series of questions beginning with,

"Prior to the publication of the Eisenschiml books did anyone state such and such a fact and such and such a fact?"

A. I remember that, yes. Yes.

Q. He had sort of a routine question.

A. Yes.

Q. In response to those questions you named, as I count them, some 31 facts?

A. Yes.

926 Q. Or deductions?

A. Right.

Q. Now, without examining any books or having your recollection refreshed, I take it you are unable to state those 31 instances from sheer recollection?

A. No, I couldn't do that. I would need to have my memory refreshed.

Q. In other words, you have to have a question put to you as Mr. Gertz did?

A. Yes.

Q. What we might call a leading question?

A. Yes.

* * * * *

927 Q. But unless someone gives you the qustion in that form as Mr. Gertz did, or unless you have the books before you, the Eisenschiml books, you wouldn't be able to sit right here and repeat these 31 or more instances?

A. No, sir.

* * * * *

948 Q. Now, with all this clarification let's have another go at it as to this part. Isn't it true that Bates does state in "Lincoln in the Telegraph Office" the excuses which Stanton and Eckert did give to Lincoln?

A. Yes.

Q. So, therefore, this answer is incorrect, isn't it?

A. No, sir, I don't think so. My understanding of that question or that group of questions was that it was getting me on the record for future examination or cross-examination in the matter of these original contributions of Dr. Eisenschiml, so that my negative answer in each case was predicated upon the fact that while a given source contained certain data only in Eisenschiml is this point of conclusion made so that by excuse I there understood not
949 merely the purported excuse with which, of course, I was familiar, but the facts in the case as involving Stanton's whole behavior. That is why I wouldn't wish to change my answer on that question.

Q. In other words, then, this literal answer to the effect that before Eisenschiml "No other author stated what excuses were given by Stanton and Eckert on the night of the assassination," your literal answer that no author had so stated has to be interpreted in the light of what you have just said, it isn't complete on its face, on its four corners?

A. I am willing to accept that.

Q. Will you accept that?

A. Yes.

Q. In other words, you were implying the whole Eisenschiml theory?

A. Yes.

Q. And you knew or you suspected that the next question would be as to whether the excuses that they had given were not true?

A. I didn't—

Q. Did you know that Mr. Gertz was going to ask you that question next?

A. I knew he was going to ask me a similar question.

* * * * *

950 Q. Well, here is another one of those cases where the evidentiary fact was stated before, but the inference drawn by Dr. Eisenschiml had not been stated before, is that a fair way to put it?

A. There are in Dr. Eisenschiml's books a number
951 of inferences drawn from what would have to be called negative references—well, not references—would have to be called negative—

Q. Negative facts?

A. Facts, yes, facts.

Mr. Gertz: Omissions?

Mr. Martineau: We can understand that, couldn't we, Elmer?

The Witness: Omissions, yes. That would modify my answer to your question to that degree.

* * * * *

955 Q. Incidentally, Dr. Eisenschiml very closely parallels Moorefield Storey on that point, doesn't he?

A. I think we brought that out in the cross-examination.

* * * * *

956 Q. Now, isn't it true that other authors prior to Eisenschiml stated the facts as to some of the things Major Eckert did on the night of the assassination?

A. Yes.

Q. And didn't they state them in practically the same language that Dr. Eisenschiml stated them?

A. As to those specific facts, yes.

Q. That is right. I mean, always excepting the inference Dr. Eisenschiml finally draws from it.

A. Yes.

* * * * *

966 Mr. Martineau: Q. Well, what inference do you understand Dr. Eisenschiml to draw from this fact that there were five people instead of four?

A. This is a distinction between the standard, ortho-

dox story of the assassination and the revisionist report of the assassination which Dr. Eisenschiml made.

Q. Do you regard this one facet as an important part of Dr. Eisenschiml's new theory?

967 A. I should say not important, no.

* * * * * * *

971 Q. In other words, let me see if I can follow you there, Doctor. In other words, the heart and soul of Dr. Eisenschiml's work, as you understand it, is the establishment of the probability that Stanton was an accessory in the murder of Lincoln?

A. Yes, sir.

* * * * * * *

974 Mr. Martineau: Q. Let me see, Dr. Riddle. Maybe I am too fascinated by it myself, I don't know.

As I understand it, the heart of Dr. Eisenschiml's theory and works is the complicity or the probable complicity of Stanton in the murder of Lincoln?

A. Yes, sir.

* * * * * * *

983 Q. Well, as a matter of fact, wasn't that all utterly immaterial to keeping the chase away from Parker, because wasn't everybody asking, "Where is this guy Parker? Why wasn't he on the job? He was the guard." Isn't that ... e, right at the time?

A. I would think so, yes, sir.

Q. So, that the suppression of the Harris-Rathbone divergencies wouldn't have been successful in keeping the chase away from Parker's negligence, would it?

A. No.

Q. Then can't we agree that that is utterly immaterial to the Eisenschiml thesis?

A. But not utterly immaterial to Mr. Gertz' question.

Q. No, that is true.

A. Yes.

Q. Granted, but it is immaterial to the Eisenschiml
984 thesis, the divergencies of the Rathbone-Harris statements?

A. Yes, I would say so.

* * * * *

Q. Now, Mr. Gertz asked you this question:

"Prior to the publication of the Eisenschiml books did anyone state that Stanton had perjured himself as to Lincoln's last visit to the War Department?"

And your answer was—

A. No.

* * * * *

987 Q. Eisenschiml didn't say that Stanton perjured himself, did he?

A. Not in so many words.

* * * * *

988 Q. Calling your attention briefly, Doctor, to this question put to you by Mr. Gertz:

"Prior to the publication of the Eisenschiml books
989 did any author point out that Grant's excuse for not attending the Ford Theatre with the Lincolns was a sham?"

And then you answered "No" as to that; do you recall that?

A. Yes, sir.

* * * * *

991 Q. Now, Eisenschiml doesn't say that Grant's excuse was a sham, does he? He doesn't use that verbal expression?

A. No, sir.

Q. So that your answer to Mr. Gertz' question would have to be amended, then, wouldn't it?

A. No, sir, I don't see why it should be.

Q. In other words, you understood the question to call

for just a characterization by you of Eisenschiml's treatment of these Grant episodes, is that it?

A. Yes, a characterization of Grant's behavior.

Q. In other words, that last part, there Dr. Eisenschiml is suggesting that Grant was innocent, he is giving his opinion there?

A. Yes.

994 Q. What I was getting at, Doctor, was this: The factors, the basic factors or evidentiary facts would be more correct, were matters of history?

A. Yes, sir.

Q. And that includes negative facts?

A. Yes, sir.

Q. But no one had ever put the thing together with the view of pointing the finger at Stanton until Dr. Eisenschiml?

A. Yes, sir.

Q. Until he had interpreted it in that manner?

A. That is right.

1010 Q. In other words, to use the analogy that we were using I think once last week, if we were to regard each one of these basic evidentiary facts as a stick, a separate stick, and you think of the final inference drawn by Dr. Eisenschiml as a fagot, a bundle of sticks, he, Eisenschiml, if I understand you, was the first man who ever tied the bundle of sticks together with the rope of his inference, namely, that Stanton was a partner in crime?

1011 A. Yes, sir, except that I would also wish to reserve in that that some of these sticks, to use your figure, were negative observations, that is, Dr. Eisen-

schiml drawing a conclusion from the fact that this or that point had not been mentioned.

* * * * *

1013 Mr. Martineau: Q. Just one more question on that I think very helpful figure of speech we have been using about the fagot and the different sticks. The rope that we spoke of with which Dr. Eisenschiml tied these various sticks together was his thesis that Stanton was a partner in crime in the assassination of Lincoln?

A. Yes, that would be the rope.

Q. Do you remember, Doctor, Mr. Gertz asked you this question:

> "Prior to the publication of the Eisenschiml books did any author state that the War Department knew the identity of the conspirators for several weeks previously?"

And you answered: "No". Do you recall that,
1014 Doctor?

A. Yes, I recall it.

* * * * *

1015 Q. What does Dr. Eisenschiml cite as his author-
1016 ity for that statement?

A. There is a footnote 16, Surratt Trial, Volume 1, 454.

Q. Would you regard that as a prior author? Wouldn't you regard that as a mention of a book or author prior to Dr. Eisenschiml as authority for that statement?

A. I would mention that as a source containing that information.

Q. Well, I mean, don't we have to examine your answer to this question then in the light of the fact that Dr. Eisenschiml himself meticulously cited that source you referred to?

Mr. Gertz: Just to keep the record straight, that is the record of the actual trial of Surratt—

Mr. Martineau: Yes.

Mr. Gertz: —transferred in this case.

Mr. Martineau: Where I suppose the facts came out.

The Witness: Yes, the answer would be that the fact, as was true of all facts which Dr. Eisenschiml derived, appears in a primary source. It does not appear in any general story of the assassination.

• • • • •

1017 Q. But you distinguish between that primary source and some other historian?

A. Yes.

Q. Drawing a similar conclusion?

A. Yes.

Q. Or making a similar statement, is that it?

A. Yes.

Q. I just want to understand you on that.

Mr. Gertz: Jack, so that there won't be any question, the Surratt proceedings are a length volume filed with all—

Mr. Martineau: Why do you want to argue this all the time?

Mr. Gertz: I am not arguing—

Mr. Martineau: I want to finish my cross examination.

Mr. Gertz: I want to make this clear. I have been very patient. I had a man on the stand for half a day. He has been cross examined for six days.

Mr. Martineau: Because of tactics like this.

Mr. Gertz: On every kind of thing under the sun.

1018 I have been as patient as I can be, but there are limits as to how much a man can be cross examined. Now, I want to every now and then, at least, call a halt to this just endless chewing over these things, and where a man tries to create an impression on cross examination about books or anything else, I am entitled to try to cut the thing short, to make it briefer. I think

it is just unconscionable that a man should have been on the stand so long in cross examination as it is.

Mr. Martineau: The only unconscionable part was the questions that were asked.

Mr. Gertz: I have a right to try to cut it down.

Mr. Martineau: That is the unconscionable part, the questions that were asked him.

Mr. Gertz: Nonsense. You could have cut this cross examination to two days at most, and you have been at it six days.

Mr. Martineau: Will you just read back there, now, just what the last answer was?

I don't want any more sniping.

Mr. Gertz: I will do anything I see fit to protect the record.

Mr. Martineau: He makes his final argument in the 1919 case.

Mr. Gertz: I would like counsel to cut short his cross examination.

Mr. Martineau: Now we are getting down to the short strikes and we are getting very nervous.

Mr. Gertz: I am not getting nervous at all. I just regret and resent the prolonged cross examination. I think the Court should instruct counsel to wind up his cross examination.

The Master: Let's have the next question.

Mr. Martineau: In that case, if I may make one final statement, I am merely asking questions related directly to answers that this man elicited from Dr. Riddle on direct examination, and I think I have every right to do it.

The Master: Yes, you have that right.

Mr. Martineau: I am trying to do it as briefly as possible under great handicaps.

The Master: All right, continue with your cross examination.

Mr. Martineau: Shall I proceed to the next question, your Honor?

The Master: Yes, surely, go ahead.

* * * * *

1020 Q. That was very fair on your part. Now, you testified, Doctor, in response to a leading question by Mr. Gertz to this:

"Prior to the publication of the Eisenschiml books did any author point out that Stanton wilfully withheld the news of the assassination?"

1021 Your answer was "No." Do you recall that?

A. Yes, I do.

Q. Then the next one, "Or why he withheld such news?"

"A. No."?

* * * * *

1024 Q. Now, isn't it true, Doctor, that many other—or several other authors that is—had stated that first of all Booth was known to be the murderer practically immediately after the murder, several authors had said that before?

A. Oh, yes.

Q. And isn't it true that other authors before Eisenschiml had also said that Stanton was apprised of what these other witnesses had said, almost immediately?

A. Yes.

* * * * *

1027 Q Did you read Coggeshell? I forgot what you testified to on that.

A. No, sir, I don't believe that I did.

Q. Well, I suggest to you that at page 44 he points out that one of Stanton's first dispatches to Major General Dix was sent three hours after the assassination. Do you think that fairly suggests the inference that Stanton withheld the news for three hours?

A. Yes.

1028 Q. Coggesheil was a prior author, wasn't he, prior to Dr. Eisenschiml?

A. Yes. That is, however, merely making a statement of an alleged fact with no conclusion drawn.

Q. That is right. Well, we agree on that. The facts were stated by prior authors, but your point is Dr. Eisenschiml was the first man to suggest that Stanton was a partner in crime?

A. Yes.

Q. Now, the next one, Mr. Gertz asked you:

"Prior to the publication of the Eisenschiml books did any author point out that Gobright acted peculiarly by killing one of his own wires to his newspaper?"

And you answered "No" to that.

A. Correct.

* * * * * *

1029 Q. Well, then, do you think it is fair to say that another author had before Dr. Eisenschiml pointed out the peculiarity of Gobright's actions, if any?

A. That is exactly the point. I know of no other author who had pointed out the peculiarities of Gobright's action. Certainly Gobright did not.

Q. All he did was state the facts?

A. Yes.

Q. And Eisenschiml said this shows Gobright
1030 acted peculiarly?

A. Yes.

Q. And that is the part where Dr. Eisenschiml is unique, in your judgment?

A. Yes.

Q. Do you regard this as an important evidentiary facet of Dr. Eisenschiml's thesis that Stanton was a partner in crime?

A. The Gobright episode?

Q. Yes, sir.

A. No, sir.

Q. Now, the next one Mr. Gertz asked you, and I will see if I can shorten it up: You testified in response to a question by Mr. Gertz that before the publication of Eisenschiml's books no author had pointed out that the news of the assassination was relased too late for the morning editions of the newspapers to print, do you recall that testimony, Doctor?

A. Yes, sir.

Q. Did other prior authors, however, point out the fact, the fact as to when the news of the assassination was released to the newspapers? The facts were pointed out
1031 and Eisenschiml was the first man who said this shows that the news was released too late for the morning papers, is that it?

A. Yes, sir.

• • • • •

1039 Q. Now, we have touched on this next one before, but I want to ask you one or two questions about it. You testified that before Eisenschiml's books no prior author had pointed out that the interruption in the wire service must have been an inside job?

A. Yes, I recall that.

Q. Now, Eisenschiml didn't use that language anywhere, did he?

A. No, sir.

• • • • •

1040 Q. Well, so we can pass on then, can we agree that
1041 the facts of the interruption of the wire service were known, admitted historical facts which had been known by everyone since the time back in April of 1865, but until Eisenschiml came along no one ever drew the inference which he did, namely, that Stanton, being a

partner in crime, must have ordered the interruption of the wire service.

A. I would have to revise the date of the availability of the information to 1867, the impeachment proceedings.

* * * * *

Q. Then we have touched on this one before, but I want to ask you one question about it briefly. You
1042 testified that prior to Eisenschiml no author had pointed out that Pitman deliberately mutilated the official report of the trial, do you recall that?

A. Yes.

* * * * *

Q. Are you acquainted with the book called "The Judicial Murder of Mary E. Surratt" by David Miller DeWitt?

A. Yes, sir, I have seen that book. I have used it.

Q. You recall that at pages 184 to 186 DeWitt points out how Pitman mutilated the record of the trial to the extent, at least, that he neglected to insert in the proceedings the recommendation for the clemency of Mrs. Surratt? Do you recall that?

A. Yes, sir.

Q. Would you regard that as a mutilation of the record of the trial?

A. It is so-called. Yes, I would regard that as a reference to mutilation, but, of course, what Dr. Eisen-
1043 schiml is alluding to is the mutilation at the point of the Fletcher testimony.

Q. Is that what you were alluding to?

A. Yes.

Q. When you answered the question in those general terms?

A. Yes.

* * * * *

1054 Q. I will give it to you exactly.

"Prior to the publication of the Eisenschiml books did any author point out Gleason's part in the story?

"A. No."

A. Yes.

Q. In fact, weren't all the parts of Gleason's part in the story told by prior authors, one of whom was Gleason himself?

* * * * * *

A. Yes, the footnote reference to that earlier passage which we discussed this afternoon is the same place, Gleason's article in the Magazine of History.

* * * *

1056 Q. Gleason was an author, wasn't he?

A. Yes, and he pointed out these references.

Q. Yes, which you have just read.

A. Yes.

Q. So, therefore, prior to Eisenschiml Gleason had pointed out his part in the story?

A. These references to his part of the story, yes,
1057 sir.

Q. And we agree that Gleason was, to that extent, at least, an author?

A. Oh, yes.

* * * * *

1058 By Mr. Martineau:

Q. Doctor, just one more question about those peculiar clues in Atzerodt's room.

A. Yes, sir.

* * * * *

1062 Q. I am at sea on it. Could you straighten me out on what Eisenschiml's thesis is there?

A. Dr. Eisenschiml's thesis is that Booth deliberately placed these clues which would clearly indicate the route

of the escape and the means of escape, assuming that since they were so obvious they would not be acted upon.

Q. And if that, there never was a plot to assassinate Johnson at all?

A. Yes, sir.

1063 Q. Now, do you understand as an expert that at that place Millard is suggesting the same thing to the reader that Eisenschiml does?

A. Yes, sir.

Q. He recites the same facts you mentioned, does he not?

1064 A. Yes.

Q. But doesn't Millard suggest that the whole thing was sort of crazy, fantastic?

A. Yes, and so does Dr. Eisenschiml.

Q. Doesn't Millard just simply—you said that Eisenschiml's thesis was that Booth was just indulging in braggadocio and bravado here and was operating on the psychology that they would not follow these two patent or obvious clues, such tactics?

A. Yes.

Q. And therefore you ascribe to Eisenschiml's theory a very astute logic and reasonableness about this action of Booth's in regard to these clues, don't you?

A. Yes.

Q. There is nothing crazy about that, is there; that is pretty shrewd, isn't it?

A. Yes, sir.

Q. Doesn't Millard suggest the exact contrary?

A. Oh, I see the point of your question. You point to a difference at this point between Millard and Eisenschiml?

Q. Yes. In other words, as to the inference that they draw from these admitted facts regarding the clues. Don't

they draw really contrary inferences, in your opin-
1065 ion?

A. Well, as I take Mr. Millard's reference, it fits into his title of an unsolved murder, and that this set of clues is one example of the many curious and illogical affairs in the whole story.

Q. That is what Millard says, isn't it?

A. Yes.

Q. In other words, America's greatest unsolved murder, and Millard simply says these questions are not answered. He says that in these very words, doesn't he?

A. Yes.

Q. "Questions and more questions—but the only answer is silence," and that is the way Millard ends this discussion of these clues, isn't it?

A. Yes, sir.

Q. Now, Eisenschiml gives an answer, doesn't he?

A. Yes.

Q. Namely, that Booth was a super-shrewd psychologist, isn't that right?

A. Yes.

Q. Now, can we agree, then at least as to the inference the two respective authors draw from these known facts, they draw different inferences?

1066 A. Now, then—

Q. Can we agree to that, Doctor?

A. I can agree to that.

* * * * *

1067 Q. But you agree that Millard drew a contrary inference from those facts to Eisenschiml's inference?

A. I would prefer to say a difference—

Q. A different inference?

A. Yes.

1068 Q. All right, I think that is more accurate anyway, but can we further agree that it is possible that

Millard derived even his facts from the common source and not from Eisenschiml?

A. No, sir, I think you have just shown that the record contains a statement that the map and the spur are not referred to.

Q. In other words, as far as—

A. And they do appear in Millard and Eisenschiml. That is the point of exception.

Q. In other words, when I showed you David DeWitt's book they were not referred to there, the map and the spur?

A. Yes, sir.

Q. But if they appeared in some other original source then your opinion as to the internal evidence, the conclusion you draw from the internal evidence showing that Millard derived the facts from Eisenschiml rather than that other original source, would be different, wouldn't it?

A. It would.

* * * * *

1071 Q. In other words, Poore gets the map and the spur into the act, doesn't he?

A. He does.

Q. So now can we agree that it is possible that Millard derived his facts from common sources, including Poore?

A. Yes, sir.

Q. Rather than from Eisenschiml?

A. Yes, sir.

Q. And we have already agreed that they draw different inferences and have different interpretations of those facts?

A. Yes, sir. I call attention also to our previous discussion on probability of this episode.

Q. In other words, it would have been much easier for Millard to have copied it from Eisenschiml than to have read it in the original source?

A. Yes, sir.

Q. And I think you also said that if Millard testi-
1072 fied that he owned or had access to Poore and Pitman then that would change your opinion?

A. Yes, sir.

Q. And your opinion then would be that Millard did derive it from the original source?

A. Yes, sir.

* * * * *

Q. Doctor, you testified in response to Mr. Gertz' questioning that Harrison's story was never published in any account of the assassination prior to Dr. Eisenschiml's books. Would you briefly tell us what Mr. Eisenschiml says about Harrison's story?

A. This is a part of the John Surratt story related in Plaintiff's Exhibit 2, "In the Shadow of Lincoln's Death".

* * * * *

1074 By Mr. Martineau:

Q. And what authority does Dr. Eisenschiml cite for that?

A. These are all derived from the Surratt case.

Q. The trial of John Surratt?

A. The trial of John Surratt, yes.

Q. So that that is another one of those situations we dealt with earlier where the facts about Surratt going under this name of Harrison and the so-called Harrison story were brought out in the Surratt trial, but no other historian or author had written any book or article on it?

A. Yes, sir. There is a further reference, Mr. Martineau, which involves further statements about this
1075 so-called John Harrison. That is Pierre Pont. It takes a little doing to locate a reference in this book, if you will excuse me for a moment.

Q. Pierre Pont, did you say?

A. Yes, sir. It is Chapter 13, reference 28. No, that is also from the Surratt trial. There is an inner refer-

ence to Riddle. This is the same Albert Gallatin Riddle "Recollections", page 340, footnote—but that is extraneous to this general story.

Q. I see.

A. The source reference as to the John Harrison story is the record of this John Surratt trial.

Q. So that your prior answer stands?

A. Yes, sir.

Q. That while it is a matter of history as shown in the record of the Surratt trial no other author had mentioned the fact?

A. Yes.

* * * * *

1076 Q. Then you testified further, Doctor, that before Eisenschiml no one had ever speculated as to why Cox, Jones, Bainbridge and Ruggles were not punished?

A. Yes, sir.

* * * * *

1077 Q. The fact that they were not punished was known to all the world?

A. Yes.

Q. But no one before Eisenschiml ever asked, in effect, why were they not punished?

A. Yes.

Q. And so to that extent he is to you unique?

A. Yes.

Q. Can we agree further, Doctor, that it doesn't require any unique analytical genius to ask that question,
1078 why were these people not punished, when they took such an obvious part in the conspiracy?

A. No, I don't think it does.

* * * * *

Q. Fine. You testified that before Eisenschiml no one had ever pointed out that Stanton and John Parker were dismissed at approximately the same time?

A. Yes, sir.

Q. That is another one of those situations, I suppose, where the facts were known—

A. That is right.

Q. —where he who runs may read?

A. That is right.

Q. But until Dr. Eisenschiml no one had ever called attention to the simultaneity of the dismissals of both these men?

A. That is right, he brought the two facts together.

* * * * *

1080 Q. You don't understand Dr. Eisenschiml to have been the first one to suggest that there was a mystery about the death of Abraham Lincoln, do you?

A. No, sir.

1081 Q. Do you understand Dr. Eisenschiml to have been the first person to suggest that Booth was being protected by some high personage and that that was the reason why his road of escape was known and kept open?

A. I think it may be that Lloyd Lewis implies that.

Q. In other words, can we agree that as far as your studies go, Doctor, that Eisenschiml was not the first one to put that question?

A. We can so agree.

* * * * *

1084 Mr. Martineau: Q. Dr. Riddle, do you understand Eisenschiml to have been the first person to have opined or stated or speculated that the conspiracy and murder of Lincoln was much more widespread than was generally accepted and that it reached the high Washington quarters?

A. There again I think Lloyd Lewis dimly alludes to that, but I would still say that Dr. Eisenschiml is the first

one to bring these materials together and make that whole generalization.

Q. Yes. In other words, can we agree, then, that
1085 Lloyd Lewis, as you say, dimly suggested it, but Dr. Eisenschiml, you feel, was the first one to focus the spotlight on it and document it?

A. Yes, sir, and I should like to add that Dr. Eisenschiml introduces many more factors than anyone before him did.

Q. Yes. Well, all that I was suggesting was that the end result hypothesis, if there is such a word, to the effect that the conspiracy was much more widespread than was generally accepted, and that it reached into high Washington quarters, had been dimly suggested by Lloyd Lewis prior to Eisenschiml?

A. Yes.

* * * * *

Q. While Mr. Reuben is finding the last subject
1086 he calls my attention to this statement in DeWitt's book, "The Assassination of Abraham Lincoln", at the bottom of page 209:

"Under the date of Saturday, April 15, 1865, appeared the name of 'John Harrison' which proved to be in the handwriting of a prisoner."

That was from David DeWitt. That, of course, is a reference to this nom de guerre John Harrison used by our friend John Surratt?

A. Yes.

Q. Was it not, so at least that part of the Harrison story had been told by David DeWitt, namely, the bare fact that Surratt used the name and registered at the Webster House in Canandaigua, isn't that true?

A. Yes, sir.

Q. So we can agree, then, that David DeWitt was a

prior author who had mentioned that part of the Harrison story before Eisenschiml?

A. Yes.

* * * * *

1089 Q. So would you say that that was a statement by Millard, a correct statement of a historical fact as regards that gimlet hole?

A. Yes, sir, I should go farther to say that that was not derived from Dr. Eisenschiml. That, of course, is what I have testified to time and again. I have never tried to make the point that Mr. Millard derived everything from Dr. Eisenschiml. I think I stated specifically that I assumed that Mr. Millard had used other books such as Sandburg and Pitman. It may be that he used Oldroyd. The point that I have testified to or the points as an expert witness pertains merely to these parallels with the Eisenschiml books. The substance of the Millard article is derived from them.

I asume—I am sure that as detailed analysis of the article on the basis of other such books as these that you have just used would indicate the use of those books by Mr. Millard. I have never—

Q. You have never suggested the contrary?

A. I have never suggested the contrary, no, sir.

1090 Q. In other words, as to matters that Millard got from other writers or original sources you certainly don't suggest, unless the context so shows, a parallelism between him and Eisenschiml there?

A. The point is simply that I did not take it to pertain to my interest here to make any such examination. As I read the article I could see some recognizable aspects. What I did was to try to determine whether or not in these parallel passages Eisenschiml probably was the source used by Mr. Millard. Certainly there were other sources. This I would take it is one of them.

Q. In other words, you don't want the Court to understand that you give it as your opinion that Joseph Millard did not indulge in any independent research of his own?

A. No, sir.

Q. And for all you know he may have spent months on this story researching very conscientiously other sources?

A. For all I know he may have. I don't see how he could make a living spending much time at it, but then that is an extraneous matter, I presume. The substance of my statement is merely that I do not know and I do not so suppose.

1091 Q. And you do not so suggest?

A. No, sir.

Mr. Martineau: Well, Doctor, I think that is all with the reservation that I mentioned before, and I thank you very much and I thank you for your extreme courtesy and patience and bearing up with my silly questions.

The Witness: Thank you, Mr. Martineau.

May, I your Honor—

Mr. Gertz: For the record, I also want to thank you very much, so much so that I am going to put my thanks in a more specific and concrete form. I have no desire to have any redirect examination of you. So far as I am concerned, I am through with you as a witness today.

* * * * *

1093 Mr. Martineau: Before you start, Elmer, I don't think, or at least I will object to your offering it as the deposition of an adverse witness since Mr. Millard is an independent contractor not connected with the defendant in any way except by contract in this case. I just want to save my record on it, that is all. I don't think he is an adverse witness.

Mr. Gertz: I am prepared to argue it later, but I don't think we have to do it now.

The Master: As a matter of fact, won't I have Millard's whole deposition before me?

Mr. Martineau: That is right, your Honor.

Mr. Gertz: Of course you may, and I should say
1094 now certain portions of it, I think, are objectionable, and we reserved the right, both of us, to object to any particular portions. We agreed that since the bulk of it is obviously admissible for one side or the other, we won't object to its all going in, but we reserve the right to take specific and particular objection to any portions of it.

Mr. Martineau: As far as I am concerned, I would waive any objection I made to any question of yours. You probably don't feel the same way, but I mean I am not even going to argue any objection that I made to any questions Elmer asked so I will withdraw that now. I was going to offer the whole Millard deposition, all of it.

* * * * *

1130 Otto Eisenschiml:

* * * * *

Direct Examination (Continued) by Mr. Gertz.

* * * * *

Q. Doctor, I call your attention to Plaintiff's Exhibit 1, and I call your attention to the fact that on a number of pages there are markings and underscorings. Who put those in that book?

A. Originally these underlinings were made by me and then extra copies were made by people in my office.

Q. You mean identical underlinings?

A. Identically the same. This does not happen to be my handwriting.

Q. But would you look at the markings so that we can be sure, because I want to make sure that there is no question about those being his markings.

A. They are my markings.

1131 Mr. Martineau: While he is looking I must say that I did not know that the exhibit itself was a marked copy. Maybe I was a little negligent there of the book.

Mr. Gertz: You also, Jack, have a marked copy.

Mr. Martineau: I have a marked copy, but I didn't know that the one submitted to the Court was a marked copy.

Mr. Gertz: Oh, yes. As a matter of fact, at the time of its submission to Judge Sullivan in connection with the motion for summary judgment we referred to the letter which we sent you remarking as to the markings in the book.

Mr. Martineau: Well, I don't think it is proper to submit to his Honor at this time a marked copy. I certainly have no objection to an unmarked copy; to Judge Graber, I mean, unless he wants it for his convenience, my point being, your Honor, that it focuses attention just on alleged likenesses.

Mr. Gertz: That is right.

Mr. Martineau: And you don't see the book in its proper perspective according to our view where you see the differences too. That is my objection.

Mr. Gertz: Except you have the book, and pre-
1132 sumably—and I certainly think his Honor can make comparisons—

Mr. Martineau: That is quite true.

Mr. Gertz: The book itself is before the Court and the book happens to have a number of marked passages.

Mr. Martineau: Let me ask you this—

Mr. Gertz: Which are identical, I will state, to the markings in the copies given to you, counsel.

Mr. Martineau: Quite. But what is the purpose of

submitting marked copies to the Court? That is what I want to know.

Mr. Gertz: That is what I want to bring out.

Mr. Martineau: That is what I want to know.

Mr. Gertz: Jack, I realize some of these questions I ask are going to be leading ones, I don't think you will take exception to them.

Q. The markings and the numbers, Doctor, refer to marking and numbers in the Millard article, Plaintiff's Exhibit 3?

A. That is right.

Mr. Martineau: Then I object most strenuously to this. We have gotten these tabulations in here, and I think it is highly improper to submit a marked copy, marked in that very strange—not strange manner—but pointed manner to the Court.

1133 The Court: What have you got to say about that?

Mr. Gertz: Well, all the cases on copyright infringement say that that is the very way you do it. You make parallel columns, you mark passages.

Mr. Martineau: You have made the parallel columns and you have got them in.

Mr. Gertz: And that is how the Court is informed as to the contentions with respect to infringement. This is the simplest way. The Court then has before it the entire copyrighted book, and it can make its own comparisons—

The Master: Well, subject to the objection I will let it in. Of course, I readily see where it wouldn't be a very easy job for me to take two unmarked copies here, the article in True—

Mr. Martineau: I certainly don't want to add to the burdens of the Court, but I certainly want to call attention to the fact that this is very subtly designed to lead the eye only to the alleged parallelisms in that book.

Mr. Gertz: That assumes that the Court can be misled

in that way. I assume the Court will make its own analysis of these things. I don't assume that the Court
1134 is going to be misled simply because of passages marked or not marked.

Mr. Martineau: I don't assume the Court is going to be misled. I merely call attention to the fact that that is the intention of marking these copies. I am sure the Court is far too intelligent to be misled.

The Master: I don't think I will be misled by them. I have read both of these already.

* * * * *

1141 Mr. Martineau: Elmer, I am at a loss to understand this. On this affidavit actually the bolt is past that. It requires the changing of the affidavit.

Mr. Gertz: That is right, for this reason: I want the testimony of Dr. Eisenschiml to be accurate in every respect, and he has pointed out certain slight inaccuracies, and I want to tak the opportunity of having them
1142 corrected. Supposing he had in his testimony here made certain statements? I would have the right to have him correct them.

Mr. Martineau: I know, but, Elmer, what I am getting at is this. I wonder if we are not wasting time.

Mr. Gertz: He will be through in a few minutes.

Mr. Martineau: This affidavit is functus officio already, isn't it? It is something in the past.

Mr. Gertz: No.

Mr. Martineau: Yes.

Mr. Gertz: No, at the very least it is part of what you called once a bill of particulars.

Mr. Martineau: Well, this hasn't anything to do with the bill of particulars, does it?

Mr. Gertz: You described it as such.

Mr. Martineau: All we want the bill of particulars for is for the claimed infringements.

Mr. Gertz: Yes, and this is part of it as in a moment or so you will see.

* * * * *

1146 Q. Since the publication of the February 1953 issue of "True," have you been able to arrange for the republication of "Why Was Lincoln Murdered?"

Mr. Martineau: Objected to.

The Master: He just answered that.

Mr. Gertz: No, he said he engaged an agent to attempt to get it, and I am now asking him if he was able to arrange the republication.

Mr. Martineau: We are now getting something in through the cellar door that can't come in through the front door.

The Master: Objection sustained.

Mr. Martineau: Let him bring in the people.

Mr. Gertz: I would like to argue that, your Honor. That is a very important point. The element of damage in the case is whether or not republication is prevented.

Mr. Martineau: Then bring in the people.

Mr. Gertz: You have the right to cross-examine Dr. Eisenschiml and you don't have the right to stop testimony on that point.

Mr. Martineau: Yesterday I was accused of unreasonable cross-examination for having to dig into matters like this. Now, the proper way to prove this, if it is material, is to bring in the persons who allegedly

1147 refused to publish it, not bring in a lot of hearsay. There is a way to prove it.

The Master: I think that is the proper way to prove it.

Mr. Gertz: But, your Honor, that doesn't appear from the question. You and counsel are assuming what the answer is based upon. There has been no cross-examination to bring out what the answer is based upon. There is simply a statement that since the publication of the Febru-

ary 1953 issue of "True" he has been unable to arrange the republication of "Why Was Lincoln Murdered?"

Mr. Martineau: Just look at the conclusions involved in that question.

The Master: I just don't know where we are going to get to on that proposition.

Mr. Gertz: Simply the element of damages.

* * * * *

1155 Q. I show you quote 1 of Exhibit C attached to Plaintiff's Exhibit 7, and ask you to examine it. I call your attention to the language therein in the first column under the heading "True Magazine". Do you believe that any portion thereof is copied from your book?

A. Yes, sir.

Mr. Martineau: I object to that.

The Master: Sustained.

Mr. Martineau: I move the answer "Yes" be stricken, your Honor.

The Master: The answer "Yes" may be stricken.

Mr. Gertz: Q. What portions, if any thereof, were copied from your book?

Mr. Martineau: Same objection.

The Master: Sustained.

Mr. Gertz: Q. What are your reasons for believing that any portion thereof was copied from your book?

Mr. Martineau: Same objection.

The Master: Sustained.

Mr. Gertz: Your Honor, we had six days of cross-examination on a witness—

The Master: I don't care if you had sixty. Those questions are improper. How in the world can anybody

1156 meet those questions? You can introduce this and it is up to me to determine whether or not this has been lifted from that, but just to ask the witness whether he believes he took that from his book and his saying "I be-

lieve he took that from my book," that is no way to prove that.

* * * * * *

1159 Mr. Gertz: Q. Will you point out the instances of internal evidence in any of these 66—

A. I would point out internal evidence as I consider it in quote No. 1.

Mr. Martineau: I don't want to interrupt all the time. May it be understood that my objection goes to all of this line of testimony?

The Master: The objection goes to all of this line of testimony.

The Witness: Being a writer myself I know that when I quote straight from a source book I don't 1160 find it necessary to make any changes.

Mr. Martineau: May I respectfully move to strike that statement out as not responsive?

The Master: That may be stricken as not responsive.

Mr. Gertz: I submit it is responsive.

The Witness: May I say, then, this—

Mr. Gertz: He hasn't finished. He is in the middle of an answer.

The Master: The question isn't what he does or what you do or somebody else.

Mr. Gertz: He is explaining what he means by internal evidence.

Mr. Martineau: He doesn't have to explain it. You asked him to point it out.

The Master: Read that question again.

Mr. Gertz: You are only supposed to consider the first couple of words, you are not supposed to consider a complete answer, when you make an objection, is that it?

Mr. Martineau: No, you asked the doctor—

Mr. Gertz: He was in the middle of an answer and

before he completed the answer an objection was made and that objection was sustained.

Mr. Martineau: Well, it was an objection to an
1161 obvious answer where the doctor was not being responsive.

Mr. Gertz: He hasn't finished his answer.

The Master: I know, but when is he going to finish it?

Mr. Gertz: As I understand, an objection is made at the end of an answer. As I understand it, in the orderly way of an answer you wait till a witness has finished an answer and then you object. You don't object in the middle of an answer.

Mr. Martineau: Also, it is not unusual for opposing counsel then to be accused of extending the record. Certainly you will have to admit that this type of answer will greatly extend the record.

Mr. Gertz: Well, I will let the record speak for itself.

* * * * *

1184 Mr. Gertz: Me, too, but you put me to several hours work and I think I have saved several hours time as a result, so I ought to be grateful to you, Jack.

* * * * *

1190 Q. Doctor, would you do this? Mr. Martineau, and I think often properly, objects to skip marks. I think it is well taken even though it may save time. We will do the shipping later. You read this now verbatim.

A. I shall do so.

Q. Don't eliminate anything, not a comma, not a word, and bear that in mind for future quotations.

I would be inclined to agree with Mr. Martineau on that point.

* * * * *

1201 Mr. Gertz: Q. Will you turn now, Doctor, to quote 39?

A. Yes.

Q. Do you find any internal evidence that Millard copied from you?

A. I do.

Mr. Gertz: All right.

Jack, do I understand your viewpoint correctly, and this is for the record so there won't be any question about it: It is your contention that it is improper to ask Dr. Eisenschiml to state his reasons in connection with each of the quotes for concluding that there was copying from him by Millard?

Mr. Martineau: Well, I think that is argument, Elmer.

Mr. Gertz: In other words, that is your contention?

Mr. Martineau: Yes.

Mr. Gertz: And that that contention has been sustained by the Master?

Mr. Martineau: I just want to preserve my record on it.

Mr. Gertz: Yes, and that contention has been sustained by the Master.

1202 Mr. Martineau: Let me put it to you this way—

Mr. Gertz: I don't want to just ignore the ruling on it and I want to make sure that the record shows it.

Mr. Martineau: Let me put it to you this way. I just merely want to preserve my record and do what I think is proper in a lawsuit, but if it is helpful to the Court, I think anything that is helpful to the Court certainly could go in subject to objection, if the Court feels that it would be helpful.

The Master: Well, let's go ahead for a while.

* * * * * *

1232 Mr. Gertz: Q. Yesterday, Dr. Eisenschiml, you stated that almost all of the 66 quotes contained internal evidence that Millard copied from you, and then you proceeded to set forth what you called the documentary evidence which you believe established this in several of the instances out of the 66, and in addition you cited

material as to the bartender, Michael Henry, which you allege constituted another example of copying from you by Millard. Now will you go through each of the quotes

in connection with which you gave the documentary
1233 evidence and in each instance give the explanation showing why it constitutes internal evidence of the copying by Millard from your books?

Mr. Martineau: Elmer, you mean the ones that he went through yesterday?

Mr. Gertz: Yes, that is right.

Mr. Martineau: Well, it is understood that I have just a general objection to this?

Mr. Gertz: I understand that, and I also understand that you wanted me nonetheless to go through—

Mr. Martineau: Well, I didn't want you to, but I simply said that inasmuch as Dr. Riddle had gone it, just as long as I preserve my record I am not going to interfere.

Mr. Gertz: That is okay, this is perfectly all right.

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1260 (The said album, heretofore marked PLAINTIFF'S EXHIBIT 4 for identification, was received in evidence, is attached hereto and made a part hereof.)

* * * * *

1261 Mr. Mertineau: Why do you mention it?

Mr. Gertz: I simply wanted it described. I have no desire, really, to have this in evidence.

The Master: If you don't why do you offer it?

1262 Mr. Gertz: I do have a desire to have a description of the work he did in connection with tracing, on the scene work, research that he did in order to prepare himself for the writing of the two books.

The Master: Then why don't you just ask him, "You took quite a number of pictures during your research work?"

Mr. Martineau: As a matter of fact, the doctor already testified to that on the first day of his direct examination.

Mr. Gertz: Well, later on if I think it is proper or safe I may withdraw that as an exhibit. As long as it is in let's have it in.

* * * * *

1263 *Cross-Examination by Mr. Martineau.*

* * * * *

1273 Q. I see. As I understand it, Doctor, one of your claims in this case, claims of originality in the books involved here, is that you are the first author to say that Stanton was a partner in crime in the murder of Abraham Lincoln. Do I state that fairly?

A. No.

1274 Q. State it your way.

A. I can't quite go along with you on that.

Q. State it your way.

A. In book form and by a reputable or dependable writer, I was the first one.

Q. Well, let's see if I can restate it then, to our mutual satisfaction. You were the first reputable writer, you say, to state in book form that Stanton was a partner in crime in the murder of Abraham Lincoln?

A. Indicated rather than said.

Q. I see. Well, you mean—

Mr. Gertz: In other words, he doesn't say that he was a partner.

Mr. Martineau: I don't mean to say in haec verba; but proved, shall we say? Did you prove, did you claim that you proved that Stanton was guilty?

A. No, I did not prove. I distinctly said I have not proved my case. I indicated.

Q. Well, when you say you indicated, you mean you are referring to the language at the conclusion of "Why Was Lincoln Murdered?", that chapter there when you sum up the case against Stanton?

Mr. Gertz: Don't nod, Doctor, just say yes or no.

1275 Mr. Martineau: Q. Do I state that fairly, Doctor?

A. May I read one sentence from "Why Was Lincoln Murdered?"

Q. Sure, absolutely.

A. It appears at the very end of the book. I will give you the page number. Page 438:

"A great deal of new evidence must be brought to light before students can write a definite answer to many questions that confront them in their search," and so on.

Q. I see. In other words, that was your purpose in writing the book?

A. That is right, one of the purposes—

Q. To stimulate thought on that subject?

A. To stimulate research.

Q. Research and thought and discussion?

A. Yes.

Q. And a reexamination of history on that point?

A. I agree.

Q. Well, I just wanted to get it straight now. In other words, you don't take the position in your book, as I understand it, that there is any degree of probability that Stanton was guilty, is that it?

A. There is a degree of probability.

1276 Q. I see. In other words, in your book you say there is a high degree of probability that Stanton was guilty?

A. That is right, that is a conclusion—

Q. And you set forth facts facts?

A. —that becomes almost evidence.

Q. Yes, and you set forth the facts which led you to that conclusion in your work, do you not?

A. Yes, that is correct.

Q. Now, when you wrote those two books, the two books involved in this suit, Doctor, and when I ask this ques-

tion I am speaking in this very context, did you want the public and your readers to believe that this evidence did point to Stanton's guilt?

A. No, I did not. I had no such intention.

Q. Then you didn't really think that the evidence did prove Stanton guilty, did you?

A. I put forth the facts as I found them with the hope that the readers would reach conclusions, whether in agreement with my own thoughts or against them. If you will allow me to go one step farther, I have often been described as a chemist writing history on chemical principles.

A chemist does not go into the laboratory to prove
1277 a thing. He follows the evidence wherever it leads to. It may disappoint him terribly, it may not, but if any chemist or, in my opinion, any historian, starts out to prove a thesis, he is no good chemist, he is no good historian.

Q. Your theory is, that applies generally to proving a thesis of any sort?

A. Yes, in all my works.

Q. I am a little confused. I just wanted to understand what you are driving at in this book. As I understand it then, all you say is that the evidence indicates a high degree of probability that Stanton was guilty?

A. The facts indicate it.

Q. Well, that is the evidence, can we agree on that?

A. But I do not express an opinion of my own.

Q. You are just simply saying what the facts seem to you to indicate, isn't that what you say?

A. No, I don't think I make any comments of that sort. I simply say these are the facts and more facts have to be established before we can come to a conclusion.

Q. Oh, I see. And you wanted the readers and
1278 the public at large to discuss the theory, and if possible, dig up more facts?

A. That is it.

Q. To prove it one way or the other?

A. That is it exactly.

Q. You were inviting public discussion?

A. And new facts.

Q. Public discussion and new facts?

A. That is right.

Q. Then we can agree, so that we can pass this point, that you do not take the position in the book, and don't wish to be understood as taking the position, that you yourself were pointing out that there was a high degree of probability that Stanton was guilty of complicity in the murder of Lincoln?

A. I express no opinion.

Q. You mean in the book you express no opinion?

A. In the book. As a matter of fact, I think I am counting some points against myself.

Q. Right now you mean, in this lawsuit?

A. In this book.

Mr. Gertz: In the book.

Mr. Martineau: Oh!

Mr. Gertz: In other words, you put in material 1279 that counts against the theory of Stanton's complicity?

The Witness: Yes, I remember the phrase that an indictment against him would not stand up.

Mr. Martineau: Q. I think that phrase comes along toward the end here, in this last chapter.

A. I think so.

Q. "The Case Against Stanton." Then you don't agree with Dr. Riddle—I think I quote him fairly—when he said that you had established a high degree of probability that Stanton was guilty?

A. That was his opinion.

Q. You don't agree with that opinion?

A. I do agree with it, but not in my book.

Q. You mean that is an opinion you have come to since you wrote the book?

A. It has been strengthened since I have read the book.

Q. Let's see if I understand this. When you wrote the book you felt that you did not say and did not wish the public to believe that you had established to a high degree of probability that Stanton had been guilty of complicity in the murder of Lincoln?

A. Yes.

1280 Q. Now, you say since that time you feel that you did accomplish that purpose in your book, namely, established to a high degree of probability the complicity of Stanton?

A. Probability. Always with the emphasis on probability.

Q. But you have changed, then, since you wrote the book? You feel the case has been strenghtened?

A. It has been strengthened.

Q. I see, and so you feel that the book now does prove to a high degree of probability the complicity of Stanton?

A. Don't think me stubborn, but I don't like the word "prove"; indicates.

Q. Indicated?

A. That is right. Now I go along with you.

Q. All right. Then let's get a fresh start. When you wrote the book you did not believe and did not intend your readers to believe that you had indicated to a high degree of probability the complicity of Stanton?

A. I had no such intention.

Q. But since you have written the book you now feel that the book has indicated to a high degree of prob-

1281 ability the complicity of Stanton?

A. I do believe that.

Q. What caused you to change your belief?

A. It hasn't changed. It has been strengthened.

Q. What strengthened your belief?

A. But the belief, in my opinion—my belief is quite unimportant. May I again make a comparison with a chemical principle? You ask me at what temperature water boils. It isn't a question of what I believe, but what are the facts.

Q. That is right. That is what Dr. Anton Carlson always says, "What are the facts?" I agree with that.

A. Yes.

Q. Well, all I am concerned with is what are the facts that you tried to express in your book and did express?

A. The book is an accumulation of facts. Each one dovetailing into another and each one sort of pointing that Stanton was somehow involved in the assassination plot, but I leave that conclusion to the fact itself.

Q. Well, that is the main point to your book, isn't it, that the evidence does indicate to some degree of
1282 probability that Stanton was particeps criminis in the assassination point?

A. Whether criminis I don't know; whether he knew of the plot I would say.

Q. I used a legal phrase, I shouldn't have done that. Read the question over again.

(The question was read.)

Mr. Martineau: Q. Let me put this question to you. You recall Dr. Riddle's testimony that in his opinion, his expert opinion, the heart and soul of the Eisenschiml book was that they indicated to a high degree of probability the complicity of Stanton?

A. Now I agree.

Q. Do we agree on that?

A. Yes.

Q. And you agree with that opinion of Dr. Riddle?

A. I do.

Q. And can we agree that you wanted your readers

to believe that these facts that you were setting forth did point to some degree or in some degree to complicity of Stanton?

A. I must again say I did not want my readers to believe anything, I wasn't going to influence my readers
1283 unduly. I set the facts before them, and withheld my own opinion, such as it was.

Q. You set the facts before them and where necessary, where you felt it necessary, you asked questions as to what such and such a fact would indicate?

A. That is right.

Q. Do you personally, aside from the book, believe that Stanton was involved in the assassination plot?

A. I have not made up my mind definitely on this. I am waiting for new facts and I am greatly disappointed that the new facts have not come forth.

Q. How did you expect the new facts to come forth, by persons becoming stimulated by reading your books and discussing it and writing about it, discussing your theories and arousing public interest to go out and dig up some new facts if possible?

A. Digging up new facts. Maybe I can illustrate what I have in mind and what my hope is.

Q. Yes.

A. There are some documents probably in existence that may throw some light on the question, either sustain the thesis or demolish it, I don't know and I don't care. I have indicated, for intsance, a hope that the private letters that some of these Washington newspaper
1284 correspondents wrote to their editors in confidence would be discovered some day.

Q. Yes.

A. They would talk straight. They would say, "Boss, here is something that you mustn't print unless you want to go to jail, and I with you, but this is what I know or suspect." That I would like to get.

Q. Yes.

A. Those are the documents.

Q. In other words, something which probably couldn't have been printed in those days because of fear of a libel suit, either civil or criminal, but which today could be printed without fear of such a suit?

A. That would be one of the kind of documents that I hope would appear.

Q. And I presume you also hope by these books to stimulate persons to draw new inferences from existing facts?

A. About their inferences I am doubtful.

Q. Well, I mean, would you like to see any further inferences drawn from existing facts?

A. If they were intelligent inferences that could be debated, yes.

1285 Q. Would you like to see some? You would like to see intelligent inferences drawn?

A. That is right.

Q. So that your hope, then, or your desire in these books is two-fold as far as we have gone: First, to initiate the discovery of new facts, and, second, to initiate intelligent inferences drawn from old facts?

A. Intelligent inferences from old facts or new facts.

Q. When we say intelligent inferences we mean a sound, logical and valid inference, do we not?

A. Yes, I do.

* * * * *

1292 Q. Then can we agree that you claim to be the first person to suggest that Mrs. Lincoln was responsible for Parker's appointment and therefore could be by a stretch of the imagination said to have been under suspicion?

A. Yes.

Q. Which is what you swear to here?

A. Yes.

Q. Right. In other words, you say that you are the first person that suggested that Mrs. Lincoln was under suspicion of murdering her husband or complicity, is that true?

A. The stretch of the imagination—

1293 Q. Can you answer that yes or no?

A. —is plainly sarcastically meant.

Q. Well, you swore to it, though? You say here that you discovered for the first time that Mrs. Lincoln, because of this Parker appointment, could be said to be under suspicion of complicity in the murder of her husband.

A. I say it sarcastically, by a stretch of the imagination.

Q. But you say it, don't you?

A. By a stretch of the imagination.

Q. You do say it?

A. Yes.

Q. I don't quite understand at whom the sarcasm is expressed here.

A. Millard.

Q. I see.

A. Because he expresses a suspicion.

Q. And do you express that suspicion, too?

A. Oh, no. It could be said. I don't say it. It could be said by a stretch of the imagination which, in my intention, was to throw it into ridicule.

Q. Here is what I am getting at, Doctor. Can we agree on this: Do you say that in your books, and

1294 when I say your books, I mean the two of them, anywhere that you do suggest that Mrs. Lincoln was under suspicion of complicity in her husband's murder?

A. Never.

Q. You didn't want your readers to believe that at all?

A. Not at all.

Q. There is no question about that?

A. I don't believe it.

* * * * * *

1296 Q. As pointing towards Stanton. How does this point towards Stanton, that is what I want to get through my head, the Parker story? How does it tie up with Stanton?

A. I would put less emphasis on this part as I do on the strange coincidence, if you call it that, of Parker remaining on the force in spite of his terrible record until the moment when Stanton resigned, whereupon he was fired.

Now, what the connection between Parker and Stanton is I have no idea. I would like to know.

Q. Well, are you suggesting, then, that Parker was a tool or creature of Stanton's?

A. I do not, no. I believe that he was a very incompetent man that should never have been allowed to watch Lincoln on that particular occasion, if at all.

Q. Do you suggest to your readers, Doctor, that Stanton was responsible either directly or indirectly for the appointment of Parker as Lincoln's bodyguard?

A. No, I wouldn't say that. Again, negatively
1297 speaking, if anyone else but Parker had been on duty that night the chances are that both would have met with difficulties, and connect it also, please, with the fact that Lincoln asked for a specific bodyguard and did not get it.

Q. We will get to that.

A. It is nebulous, I admit. It is nebulous.

Q. Yes.

A. I don't have the exact connecting links there.

Q. Let me ask you this, Doctor. Do you regard the fact that Mrs. Lincoln was responsible for Parker's appointment as being a necessary part of your thesis?

A. No, I do not.

Q. That is completely immaterial, isn't it?

A. So far as I know, there is no connection there. It was an appointment—I have my own ideas about that but I will never spill them in public or even in this hearing.

1298 Q. So therefore can we agree that the manner in which Parker obtained his appointment is utterly immaterial to your thesis in regard to Stanton?

A. Yes, I go along with you on that.

1299 Q. And can you go along with me on the next step: that the letter from Mrs. Lincoln to O'Beirne recommending the appointment of Parker is utterly immaterial in the establishment of your thesis in regard to Stanton?

A. In regard to the thesis?

Q. Yes.

A. It is immaterial.

Q. Yes. While we are right on this point, in other words, you don't accuse Mrs. Lincoln of anything?

A. I do not.

Q. Yes. Does Millard accuse Mrs. Lincoln of anything, any complicity?

A. Yes.

1300 Mr. Martineau: Q. And Millard did not get that idea from you, did he?

A. Definitely not.

1304 Q. Let's see if we can boil it down. You say that you cast no suspicion of Mrs. Lincoln?

A. That is right.

Q. Millard casts suspicion at her from the same facts?

A. That is right.

Q. Therefore Millard drew an inference which he saw was not your property?

A. Which he could not have drawn without using my property.

Q. Or he used, you say, the facts which were your property?

A. The facts were my property, and he used it for what I call improper purposes.

Q. All right. So you say that he used your Parker facts, your Parker and Mrs. Lincoln facts, and drew from them an improper inference which you don't draw?

A. That is right. That is approximately what I have in mind.

Q. In other words, you disclaim any connection with Millard's inference except that it came from your facts?

A. That is right.

1305 Q. And Millard did not pirate the inference from you, the inference itself?

A. The inference is definitely his.

Q. He did not pirate that from you?

A. No, sir.

* * * * * *

Mr. Martineau: Q. As it is in the affidavit now, Doctor, item 19(d) reads: "That reports of Lincoln's death had been published in various papers prior to the tragedy," giving examples.

I read that correctly, did I not?

A. That is right.

Q. And that is what you have in your affidavit?

1306 A. Yes.

Q. Did you believe that statement to be true when you put it in your affidavit?

A. You embarrass me. I misread my own book the same way, I believe, Millard misread it, because I had forgotten—

Q. If you don't mind, would you mind leaving Millard out of this part of the act?

A. All right. I probably misread my own book and thought that the news had been published.

* * * * *

1309 Q. So therefore, as far as you know of your own knowledge, the only premature reports anywhere of Lincoln's assassination were in the papers mentioned by Millard and by you?

A. That is, so far as I know.

Q. So that we don't have any reductio ad absurdum here in order to hang Millard as a literary pirate, do we?

A. I wouldn't hang him on anything.

Q. I am speaking with poetic license.

A. That is right, I understand you. You are right, there.

* * * * *

1312 Q. And when you made the affidavit you then claimed, did you not, in this item (k) that you were the first one who stated the fact of Stanton's false affidavit about Lincoln not being in the War Department on April 14, 1865, is that a fair statement?

A. That was an original statement.

Q. Yes. Then, as we saw yesterday, you amended that part of the affidavit to add to it in front of the text as written this phrase, did you not: "The significance"?

Mr. Gertz: "of".

Mr. Martineau: Q. "of". That phrase?

A. That is right.

Q. That is one of those, isn't it?

A. Yes.

Q. So you now wish it to read that the only thing that you claim, which you stated for the first time in your

1313 two books, was the significance of Stanton's false oath, and so forth?

A. That is right.

Q. Now, by significance, Doctor, I presume you meant the inference which you drew from Stanton's false oath and which inference is set forth in your books, is that right?

A. You could call it that, or you could call it the reason for Stanton's false oath.

* * * * * *

Q. Yes, sir. Could you turn quickly to that part
1314 of your book where you do set forth the significance or explanation of Stanton's false oath?

A. Yes, sir.

Q. That is quote 10, I guess?

Mr. Gertz: 9, 10 and 11.

Mr. Martineau: Q. 9, 10 and 11?

A. I think it would be about on page 34.

Mr. Gertz: Of "Why Was Lincoln Murdered?"

* * * * *

1321 Q. Clara Laughlin has another explanation for that, doesn't she? Do you remember that?

A. I do not.

Q. Without wishing to hold up the parade right there I suggest—this might refresh your recollection—that she gives this explanation in substance: that Stanton
1322 was, as we all agree, a very imperious, domineering sort of fellow, and that he very much disapproved of Lincoln's ever exposing himself, especially in the theatre, and when he knew Lincoln was going to the theatre on this night, that he was very angry about it because he thought that this was a particularly dangerous night, and therefore when Lincoln asked to have the loan of Major Eckert Stanton very curtly refused him so that he wouldn't seem to be giving sanction to Lincoln's exposing himself. Do you remember that?

A. I recall that now that you refresh my memory, but I think Clara Laughlin's reasoning was upside down.

Q. Well, that is true, but I mean—

A. It is some reasoning.

Q. It was a possible explanation, wasn't it?

A. A possible and impossible explanation.

* * * * *

1323 Q. Does Mr. Millard pirate your significance or inference that you draw from this fact?

A. I think he does it in this way: Page 106, column 1, nine lines from the bottom.

Q. Yes.

A. "At the War Department on which laid the tremendous responsibility of guarding the life and safety of the President they labored mightily over tasks of vital importance.

"Or did they?"

Now, he approaches this matter obliquely, the way I do—I mean the word "obliquely". In this case I make no claim on language repetition.

* * * * *

1325 Q. Now, your idea, if I understand it, Doctor, then is simply that this business about Stanton and Eckert and so forth, and Lincoln, that we have just been talking about was a suspicious circumstance which tended to implicate Stanton?

A. That is correct.

Q. And you think that Millard, by asking this question which you read, likewise tends to implicate Stanton?

A. That is correct.

Q. So that it gets down to Millard just asking a question and not saying anything?

A. Yes, sir.

Q. Millard says "or did they?" That is the only way he gets that idea, isn't it?

A. I think so.

* * * * *

1331 Q. Now, Doctor, looking briefly at paragraph 19
1332 (n), in the affidavit as written that says this: that you claim that Millard copied, plagiarized, infringed and pirated from you the following: "The contradictory and evasive statements of Major Rathbone and Miss Harris."

Do I quote you correctly there, Doctor?

A. That was the original statement.

* * * * *

1333 Q. You mean you think maybe you are the owner
1334 of the literary property in the contradictory and evasive statements of Major Rathbone and Miss Harris?

A. That may be so, but I make no claim.

Q. Did you intend to make a claim when you signed this affidavit?

A. I had an idea, yes.

* * * * *

1335 Q. In other words, so we are fair to you here the statement as written and before amended yesterday is untenable, you don't intend to defend it?

A. I don't intend to defend it. I might be able to, but it would lead to a great deal of unnecessary con-
1336 troversy.

* * * * *

Q. Did you dictate this affidavit, by the way, or this part of it?

A. I dictated it.

Q. You did, to your stenographer?

A. I think I dictated it. I don't know, this is a long time ago.

* * * * *

1337 Mr. Martineau: Well, maybe it would be enlightening to just see if we can refresh your recollection as to how this was done, Doctor.

Q. Does Mr. Gertz's statement refresh your recollection as to how this paragraph was done, Doctor?

A. No, I do not know that. I would like to borrow a phrase from you, Mr. Martineau, without plagiarizing you, because it impressed me very much.

Q. My statements are all in the public domain, Doctor.

A. All right. You said the other day in regard to something, "Since that time a lot of things have gone through that poor noggin of mine." That is a won-

1338 derful statement and that applies to many of these things.

* * * * *

Q. In other words, it is gone from your memory?

A. It is.

Q. This was executed just about a year ago, wasn't it? November '53?

* * * * *

Mr. Gertz: December '53.

* * * * *

1339 Q. Now, let's see. Do you remember this, Doctor? When you executed this affidavit do you recall the circumstances of executing the affidavit in your office?

A. No, I do not.

Q. But you do remember the fact of having executed it?

A. The fact certainly is substantiated.

Q. Do you remember whether or not you read it over carefully before you executed it?

1340 A. Evidently I did not read it over as carefully as I should have. Certain things—well, I am not excusing myself, I just didn't.

Q. But when you read this affidavit over you under-

stood, of course, that it contained rather serious charges against a writer, Joseph Millard, didn't you, charging him with literary piracy?

A. Oh, yes, yes.

Q. And yet you don't recall whether you read the affidavit over carefully before you made these charges under oath?

A. I evidently did not read it carefully enough.

Q. So that this one particular charge, what we call the obsolete paragraph (n) you now agree is indefensible?

A. That is right.

• • • • •

Q. Yes. So that when you made the statement on
1341 December 3, 1953, and filed it in court this particular charge of piracy against Millard was false, wasn't it?

A. I would say so, yes, or at least exaggerated.

Q. Yes. When you amended it yesterday by adding the words "the significance of" at the beginning of this clause we are talking about, by that you meant, I suppose, that you claimed literary property in the inference which you drew from the contradictory and evasive statements of Major Rathbone and Miss Harris?

• • • • •

1342 Q. Now you claim a piracy in regard to the significance of the fact?

A. That is right.

Q. Of the inference from the fact?

A. You are right.

• • • • •

1347 Q. That raises this question which I was wondering about this noon at lunch, and that is this: In connection with these facts which you say you merely set down without your own interpretation, I suppose this research of yours which you have described briefly this

morning was very, very intensive and thorough, and
1348 you have voluminous notes on it, don't you?

A. Yes, sir.

Q. Trunks full of them in fact, haven't you?

A. Yes.

Q. All setting forth a lot of facts, isn't that true?

A. Yes, I would say mostly facts.

Q. And you as the author of this book took these research notes from these researchers you have described and you said this morning you processed them, do you remember?

A. Yes.

• • • • •

1350 Q. In other words, what you are saying is that in order to produce these two books you had to exercise your great judgment as a historian and as a writer.

1351 A. Both as to what constitute facts.

Q. And how to arrange them?

A. And how to arrange them.

Q. And how to express them?

A. That is right, and the inferences and so on.

Q. And that is what you did?

A. That is right.

Q. And the selection of the facts that you want to put in this book?

A. That is also true.

Q. Yes. Now you did reject some facts which you regarded as unreliable, as not bearing on your hypothesis, did you not?

A. Undoubtedly.

Q. You must have. We can agree on that, can't we? Do we agree on that?

A. Oh, absolutely.

Q. Now, can we agree that when you selected the facts you selected such facts as would put the question to your readers as to whether or not Stanton wasn't guilty?

A. No, no, sir, this is where we disagree.

Q. Let's get your view on that.

A. I was not trying to prove Stanton's part in
1352 this in the first place. It had to develop from the facts whether or not he was involved. I set forth facts, curious facts, new facts that I discovered, and now let the facts lead me.

* * * * *

Q. So that is it fair to leave this subject in this
1353 way, then: that the facts which you selected that we have just been talking about out of this mass of facts that you researched, the ones which you selected as they appear in the book, were facts which would tend to raise these questions in the minds of the public, is that fair, just facts which tend to ask questions and not to answer them?

A. In a way you are right. I was asking, though, most of the questions, but I wouldn't answer most of the questions.

Q. Most of them. Some of them you did answer?

A. Some of them I answered and some of them I didn't answer because I couldn't. It wasn't a matter of playing cat and mouse with the reading public. I was catering to the intelligent readers, of course, and hoped that they would carry on on their own.

Q. In other words, you weren't catering to the sensationalism?

A. Absolutely not.

Q. Or what the British call the "penny horribles"?

A. Yes.

* * * * *

1364 Q. All right. Is is your feeling that Millard copied the inference which you drew here? Have we covered that yet?

A. Yes, sir.

Q. You feel that he did. We can agree that he stated substantially the same facts?

A. Yes.

Q. But what inference did Millard draw from this alleged contradiction between Miss Harris' two statements?

A. Page 110 in Millard's article, column 1, after the break, line 9:

"Had she forgotten the incident? Was it only hysterical imagining? Or was she quietly gagged?"

Q. In other words, he asked three questions, one of which was your question?

A. That is right, and it is the last one, it is the punch question.

Q. You claim the exclusive right to ask that question, do you?

1365 A. No.

Q. Do you claim the exclusive right to point out the significance of Miss Harris' two contradictory statements?

A. I claim no exclusive rights in anything. I claim that when people take my research after I have published mine it is a legal question whether they have pirated it or not.

Q. Well, just confining it to this one thing, do you claim that no one can ask questions about why Miss Harris gave these two contradictory statements unless they get your permission?

A. In regard to this instance, yes.

* * * * *

1367 Q. In other words, if I understand it, Doctor, you feel that you dug out of the archives which you
1368 described this statement by this coachman, Burns?

A. Yes.

Q. That he had taken Parker and Forbes out to get a drink?

A. I did.

Q. In other words, two people who were supposed to be guarding Lincoln?

A. Yes.

Q. And therefore having dug that out you feel that no one else had the right to make that statement without getting your permission?

The Master: What page of the affidavit is that?

Mr. Gertz: Page 6.

Mr. Martineau: That is page 6, item (p).

Mr. Gertz: (p), the subparagraph (p), your Honor.

The Witness: Yes, I am basing my opinion on the assumption that a man has a property right to his research.

Mr. Martineau: Q. In other words—

A. If I am wrong, I am wrong.

Q. In other words, just to state the thing briefly, never having seen this particular statement in any historical work before your research, and having dug it out of
1369 those archives and then having published the fact to the world, you feel that if anybody else stated that fact they should get your permission first?

A. Unless they checked up on the original source.

Q. Yes. In other words, they should either check up on the original source or else get your permission?

A. That is right.

Q. To make this statement?

A. We are completely together on this.

Q. When you made the statement did you make it as a statement of historical fact?

A. As a historical fact.

Q. And you meant to make a contribution to history, didn't you, when you made the statement?

A. You do it involuntarily and automatically.

Q. Well, that is true. You understood that when you published this book?

A. I certainly did.

Q. Certainly. So that as of now you yesterday amended this statement to add to this clause we have been discussing in item (p) "the significance of"?

Mr. Gertz: At the beginning.

Mr. Martineau: Q. Yes, at the beginning, "the statement of the coachman, Burns, that he had taken
1370 Parker and Forbes for a drink", is that right?

A. That is right.

Q. And now can we agree that you now base your literary property right upon the significance or inference which you draw from those facts?

A. That is right, true.

Q. Rather than from the facts themselves?

A. Yes. Although I do not think that necessarily I relinquish my rights on the facts themselves.

Q. Well, I just want to get your claim, that is all.

A. Yes.

* * * * * *

1371 Q. Well, you intend certainly to add to the sum total of human knowledge, don't you?

A. Not necessarily as a first object. That is a by-product.

* * * * *

1372 Q. Well, you are trying to give yourself a thrill, in other words?

A. That is the main object. It is rather selfish in a way.

* * * * *

1374 Q. You mean the books were not profitable?

A. Not at all.

Q. You lost money on them?

A. I lost money on all of them.

* * * * *

1375 Q. What facts caused you, covering all those, Doctor, the ones that we amended yesterday, namely 19(k), 19(n), and now this one, 19(p)—

A. What caused me to insert the words—

Q. I mean, what facts caused you to discover that you had made this error in omitting the phrase "the significance of"?

A. In reading this affidavit after a while the staleness has gone out of you.

Q. Staleness?

A. Staleness. When you read these things over and over again before you sign it, that is part of the story, you become stale, you become wedded to your own phras-

1376 ings and don't notice the inconsistencies any more.

Now, I think the thing that first caused me to notice this was (r).

Q. Clause (r)?

A. Yes, this is such an obvious mistake on my part and such sloppiness, if I may say so, on my part, probably my secretary wasn't present when I did this, and she mops up after me, and you should see my desk without her. I am not anticipating you.

Q. Go ahead, Doctor.

A. "The fantastic clues left in Atzerodt's room," my God, that is known to every student of the assassination. That is not a discovery of mine, those are not facts. Then I began to read this over and said, "Good God, how could a man be that sloppy?"

Q. In other words, that is what calls it to your attention?

A. That was the first thing that caused me to wonder,

is there anything else in here that I cannot—that I signed rather hastily.

Q. Do you remember when that was that this business about the clues in Atzerodt's room—

A. Several weeks ago.

Q. Several weeks ago?

A. Yes, when I first—when these hearings were
1377 first proposed.

Q. I see, before we actually got on hearing here?

A. Oh, yes. Yes.

Q. Several weeks ago it was, and did you at that time state in substance that you thought this affidavit wants to be Amended?

A. Yes.

Q. I won't ask you what your very eminent counsel said.

Mr. Gertz: Yes, he told me at that time.

Mr. Martineau: Q. By the way, Doctor, when you executed this affidavit, you realized—I think we have already covered it—that this was a pretty serious charge to a man that makes his living by writing, namely, Joseph Millard, didn't you?

A. That is right.

Q. And if substantiated, these charges could very well ruin him as a writer if he were convicted of being a literary pirate? I mean, that thought went through—

A. I would be very sorry if that would be the result, but it could happen.

* * * * * *

1379 Mr. Martineau: And I wanted to see, in view of the doctor's statements, just how serious he thought it, whether he realized the seriousness of his act in signing this affidavit, making charges of literary piracy, and that is all I was getting at.

Mr. Gertz: Yes.

Mr. Martineau: Q. Now go ahead.

A. Not necessarily. That is already in the record.

Q. You said something.

A. That Mr. Millard—

Q. Admitted getting some things from your work?

A. Admitted getting something from the books, but acted in good faith, he did not know that there was any possibility of a violation of a law, and if I were a pub-
1380 lisher I would not think that his usefulness had ended; on the contrary, that it was improved now that he knew what the law was.

* * * * *

1381 Mr. Martineau: That is right, but I got the impression from Dr. Eisenschiml—

Mr. Gertz: That is what I thought the doctor was trying to bring out.

Mr. Martineau: That is right, that Millard told him, and I thought maybe off the record in New York, that he in effect confessed that he was wrong.

The Witness: No.

Mr. Martineau: Q. He didn't do that, did he?

A. No, positively not, he never said that.

Q. In other words, all the way through, on the record and off the record, Millard, while admitting that he got certain things from your workings and that you sug-
1382 gested certain things to him, proclaiming it, in fact, that while he did that he did not feel that he was wrong at all, he felt that he was within his rights?

Mr. Gertz: He thought the law permitted him to do it.

The Witness: I agree with you.

Mr. Martineau: Yes, I just wanted to get it straight.

Mr. Gertz: He gave a very curious notion of the law, but it was his notion, I assume it is what he actually believed. I am not saying that he didn't actually believe it.

Mr. Martineau: Q. As a matter of fact, I think on direct examination you mentioned about talking to Mr. Millard down here in New York?

Mr. Gertz: Like we are talking here.

Mr. Martineau: That is right.

Q. Do you remember testifying to that? You had a talk with him off the record there?

A. Yes.

Q. You talked to Millard off the record?

A. In New York.

Q. In New York, yes.

A. Yes.

1383 Q. You had a very friendly conversation with him?

A. Very friendly. I wish him the best of luck.

Q. As a matter of fact, you complimented him on his writing, did you not?

A. I did.

Q. And you complimented him on the pace and the way he had stirred up the mystery angle and all that, didn't you? Is that a fair statement?

A. I don't think I did that. I don't think we discussed this article. I discussed his general style, and I thought he was a capable writer.

Q. Yes. Well, does this refresh your recollection, Doctor? Do you remember whether or not you said to Millard on that occasion in substance that you didn't blame him after having seen his original manuscript where you saw that he had credited you to some extent, but that you blamed the publisher, the defendant in this case, for having cut that out? Is that a fair statement?

A. No, I didn't put it that way.

Q. Well, how did you put it?

A. He started the conversation by saying that he had mentioned me honorably in the original thing, and that

portion had been taken out, so so far as morally he
1384 was in the clear, he thought.

Q. Yes.

A. And I thought so, too.

Q. Well, that was the substance of it?

A. But that has nothing to do with the legal angle of it, but the moral.

Q. I understand you, but that was the substance of the conversation between you?

A. That was the substance.

Q. And it was a very friendly conversation?

A. Very friendly.

* * * * *

1385 Q. In other words, you claim the exclusive right to say in substance: "John Wilkes Booth shot Abraham Lincoln at 10:13 p. m. on April 14, 1865."

A. Yes.

* * * * *

1389 Q. Well, in the light of this claim of yours, Doctor, at or close to 10:13, would you say if someone said that Booth fired the shot at, say, 12½ minutes after 10, would you claim that to be an infringement?

A. I can't answer that question.

* * * * *

1391 Q. So that you do not accuse Joe Millard of being a literary pirate or stealing any of your ideas in connection with just merely mentioning the clues left in Atzerodt's room?

A. I would not accuse him of piracy in stating the clues.

Q. That is right. In other words, he has your full permission to tell what was found in Atzerodt's room?

A. Oh, yes. No permission necessary.

Q. Yes. At least you wouldn't say he is a pirate for that?

A. Oh, no.

Q. Now, this morning you amended that clause by inserting the phrase "the significance of" in front of the phrase "the fantastic clues left in Atzerodt's room", right?

A. Yes, sir.

Q. Do you now claim exclusive literary property
1392 in the right to point out the significance of those clues?

A. My significance?

Q. The significance you pointed out.

A. That is right.

Q. Yes.

A. I do claim that question, yes. In other words, we agree you have the exclusive right to give your explanation of those clues?

A. That is right.

* * * * *

1398 Q. You don't claim that there is any expression copying here, do you?

A. No, I do not.

Q. By Millard?

A. No.

1399 Q. So we don't have that type of piracy?

A. That is one of the reasons why I didn't put it into the famous 66 points.

Q. That would be too hard to prove?

A. I wouldn't try to prove anything that wasn't provable.

Q. Are you claiming on this now, or what?

A. I claim no language.

* * * * *

1400 Q. We now agree that the only literary property you claim here is your explanation of the fantastic nature of these clues?

A. That is right.

Q. Which explanation you have given as that Booth did it in a spirit of bravado and contempt for the police?

A. Yes.

1401 Q. Right? In other words, you asked the question, why did he do it, and you also answered it here?

A. That is correct.

1408 Q. In other words, Millard does not say that Booth was the stage manager?

A. He does not say that.

Q. But you claim that by in other places calling Atzerodt an idiot that he, by necessary implication, says therefore someone else must have arranged this thing?

A. I would—

Q. That somebody must have been Booth?

A. Well, I would say that is a logical conclusion.

Q. I see. In other words, you have to get at Millard's putting this at Booth's door through a series of inferences?

A. That is correct.

Q. Well, do you understand Millard to be saying that John Wilkes Booth himself spread all these clues around Atzerodt's room?

A. I don't think he says it.

1413 Q. I see. And the last one was, do you claim the exclusive right to say in the context of discussing Atzerodt's activities in his room, in these clues, the following:

"If murder were its purpose, why register under his own name?"

You don't claim the exclusive right to that?

A. That already infringes on my thought that the clues were faked for a purpose.

Q. You mean that nobody has the right to ask that question without getting permission of yourself?

A. I think so. I was the first one to ask and answer the question.

Q. Well, so we get the record straight, then your answer to my question is, no one else has the right to

1414 answer that question without your permission?

A. That is right.

Mr. Gertz: Ask and answer.

Mr. Martineau: I was going to get that next.

Q. Nor to answer the question, having asked it? He must get the permission first?

A. If his answer is different from mine—

Q. His answer is different, isn't it?

A. Is it?

Q. Well, isn't it?

A. No, it is not.

Q. As a matter of fact, I put it to you that Millard doesn't answer the question at all, that he leaves it hanging up in the air?

A. Then I will relieve him of all responsibility for the non-answer.

• • • • •

1415 Q. And we can agree, also, that Millard does not, though he asked the question, what do these clues mean, answer it?

A. He doesn't answer it in so many words, but he implies it very strongly.

• • • • •

1416 Q. So, therefore, he does not pirate your idea of the significance of these clues?

A. Oh, yes. Oh, yes, he does.

Q. He does?

A. Because so far there has been no significance imputed to those clues at all.

Q. And what significance do you think—

A. They have just been inventoried.

Q. Yes.

A. And now I have given them significance, that they were planted for a purpose, whatever the purpose was.

Q. And you told the purpose?

A. I told the purpose. They were planted. Let's stop the sentence there. With the skill of a stage manager.

1417 Q. So you say to that extent Millard does explain the significance?

A. Yes.

Q. Of the clues?

A. That is right.

Q. By saying that they were planted?

A. Yes.

Q. Well, he doesn't say that they were planted, does he?

A. Well, it is so plainly implied that I don't see how we can get away from that conclusion.

Q. I mean, we can agree that he doesn't say it?

A. He does not say it in so many words.

Q. But in your opinion it is plainly implied?

A. It is.

Q. So we can leave this, can we agree also that your only reason for saying that Millard was suggesting that it was Booth who was the stage manager is the fact that he described Atzerodt as a moron or an idiot and Booth as something else?

A. I agree.

Q. Where does he describe Atzerodt as an idiot too stupid to plant clues, do you know?

A. He does not say that in so many words.

* * * * *

1421 Q. I want you to point out to me anywhere that Millard suggests that John Wilkes Booth told Atzerodt to plant these clues?

A. Nowhere.

* * * * *

1425 Q. Let's see if we can straighten it out then. In other words, that is a fact of history, the facts concerning when Stanton did actually broadcast Booth's name were known, weren't they?

A. On record.

Q. Yes.

A. That is right.

Q. And I presume the time when the morning editions came out was also a fact which was known?

A. It was mostly stated on the papers.

Q. But until you came along with your books no
1426 one put the interpretation on that you did in your books, that is your point, isn't it?

A. That is right.

Q. And as of now the only thing that you claim literary property is in that interpretation?

A. Yes, sir.

Q. In other words, as of now, Doctor, do you say that no one else has the right to point out the fact that Stanton delayed broadcasting Booth's name until it was too late to reach the morning editions unless they get your permission?

A. Or unless they go and search through the records the way I did and confirm my statements.

* * * * *

1427 Q. And you feel that by commenting on that delay
1428 of Stanton's that Millard infringed your property?

A. I do.

Q. Of course, were you intending your inference to be a fact of history, would you say?

A. It is a fact of history in itself and interpretation really illuminates it.

Q. Illuminates it?

A. That is right.

Q. Is it your concept of history, Doctor, that when a

historical fact is stated and then when a sound, valid inference is drawn from it, do you feel that the inference becomes sort of an accretion to the fact, so to speak? You remember, Dr. Riddle thought that in his opinion it did. Do you agree with that?

Mr. Gertz: I don't know if that is what he thought, Jack. I am not sure that that is a fair statement.

Mr. Martineau: Well, take out what I think Dr. Riddle thought. I don't want to misquote the record.

Mr. Gertz: Yes.

Mr. Martineau: Q. How do you feel about it?

A. I don't know that I am quite competent to answer that. In my own opinion it does.

1429 Q. But if a historian draws a sound inference from that fact to illuminate it, as you so aptly phrased it, then that inference, if sound, becomes a part of the historical fact, doesn't it?

A. I agree to that.

Q. You naturally intended this particular inference, you certainly put it forth as a sound inference, did you not?

A. I do. I did.

Q. The interpretation that Stanton made the delay that you say he made in this regard?

A. I did.

1432 Q. I am going to get to the rest of it. In other words, when the affidavit was first filed you claimed that you were the only one who had the right to discuss the premature arrest of Arnold and O'Laughlin?

A. That was my impression at that time.

Q. Yes. Now, the other day that was amended, I believe, by adding in the beginning of that sentence or preceding it, "The reasons for"?

A. That is right.

Q. Is that correct?

A. Yes.

Q. Now, can we agree that that phrase, "The reasons for", means the explanation?

A. Yes.

Q. Given by you of the premature arrest?

A. I agree, Mr. Martineau.

Q. So to analyze the thing further, the fact that O'Laughlin and Arnold were arrested, and when they were arrested, the hour and so forth, I presume is a matter of history, isn't it?

1433 A. The day.

Q. The day, yes.

A. Yes, is a matter of history.

* * * * * *

1451 Q. And so, Doctor, so that we can button this item up, you say that you claim that no one without your prior consent has the right to point out that this so-called Sam letter is not a valid explanation for the arrests of O'Laughlin and Arnold?

A. Yes, I go with you on that.

Q. Can we agree that your expose of the Sam letter as such explanation is a historical fact since you have pointed it out?

A. It is a historical fact, or you might say historical deduction.

Q. Yes. It is sort of a negative historical fact?

A. If everybody insists that it is a sound deduction it becomes a historical fact.

Q. Well, you consider it a sound deduction, don't you?

1452 A. I believe it is.

Q. In your philosophy it is a historical fact, isn't it?

A. In my philosophy it is.

* * * * * *

1454 Q. In other words, this is another one of those cases where the basic historical facts were lying up there on the surface where he would runs may read but it took this other fact that you discovered, this second letter, to act as the touchstone to set off your skepticism?

A. I go with you a hundred per cent.

* * * * *

1456 Now, Doctor, when you filed the affidavit here, on December 3, 1953, you claimed as new factual material presented by you for the first time in your books the following:

"The discovery that O'Beirne, who almost caught Booth was recalled after telling what he knew to Grant's chief telegrapher,"—isn't that true?

A. I claimed that at that time.

Q. You did.

Mr. Gertz: What is that number, Jack?

Mr. Martineau: That is No. (ff) in 19.

The Witness: Yes.

Mr. Martineau: Q. In other words, when you filed the affidavit you claimed that you were the only one that had the right to point out the discovery that O'Beirne who almost caught Booth was recalled after telling what he knew to Grant's chief telegrapher?

A. I did.

Q. Initially, that is?

A. Yes.

Q. And you claimed, also, that the defendant had 1457 pirated that property from you?

A. Yes.

Q. Initially?

A. Yes.

Q. You now, as I understand it, do not any longer claim that as literary property?

A. That is correct.

Q. You have withdrawn that claim?

A. Completely withdrawn it.

Q. You no longer charge Millard with being a pirate or taking this property?

A. In this particular instance, no.

Mr. Gertz: (ff).

Mr. Martineau: Well, how did you happen to charge him with this piracy in this regard in the first instance, under oath?

A. By error of judgment on my part. I had these papers, the O'Beirne papers in my possession, in my exclusive possession. I think we are agreed on that. I read the O'Beirne papers over, had them in my mind, as a matter of fact, and thought that anything and almost everything that pertained to O'Beirne was my property in the sense that we are discussing it. I was misled. There

1458 is one item about O'Beirne that is not exclusive to the O'Beirne papers, that had been published before, so if that is an explanation, or not an excuse, I make no excuses—it is an explanation of how the thought came to my mind that the O'Beirne papers, this being an O'Beirne paper, was exclusive to me.

* * * * *

1464 Q. And now anyone can point out that O'Beirne almost caught Booth and was recalled after telling what he knew to Grant's chief telegrapher, Captain Beckwith, anyone, I say, can say that without your permission?

A. Yes, sir.

* * * * *

1466 Q. In other words, when you first executed this affidavit on December 3, 1953, you stated that you were the first man who came to the conclusion that the conspiracy to assassinate Lincoln was much more widespread than generally accepted, and that it reached into high Washington quarters. Do I state that correctly?

A. That is right.

Q. And you claimed that conclusion, the statement thereof, as your literary property?

1467 A. I did at that time.

Q. Yes, sir, and you also claimed that no one had the right to use that property without your consent?

A. I think so, yes.

* * * * *

1468 Q. I see. I got my note wrong on that, yesterday, then. In other words, you still claim as your exclusive literary property the conclusion that the conspiracy was much more widespread than generally accepted, and that it pointed to Stanton?

A. Yes, sir.

Q. No one else has the right to say that without your permission?

A. That is right.

Q. Now, do you contend, Doctor, that you were the first person ever to state that the conspiracy was much more widespread than was generally accepted?

A. That takes in a lot of territory.

Q. Well, you think it over to yourself because you took the territory.

A. Yes.

* * * * *

1469 Q. Well, isn't it true, though, that other writers had stated their conclusions that the conspiracy was more widespread than generally accepted, and that they had stated such conclusion before you did?

A. They had—I beg your pardon, I think we can get together on this by saying that they had expressed suspicions.

Q. Well, that is all you did, wasn't it. express suspicion?

A. No, I substantiated my suspicions.

* * * * *

1478 Q. Well, therefore, you say that there is no connection between the escape of Booth and Herold over the bridge and Stanton?

A. I see no connection, no possible connection there.

Q. Does Millard?

A. I don't think so.

1479 Q. Let's see what he says about it.

Mr. Reuben: It is on page 114. It starts at the bottom of 113, really.

Mr. Martineau: It starts at 113 and goes—

Mr. Reuben: All the way through 114.

Mr. Gertz: You mean after the break in the second column in page 113?

Mr. Martineau: Yes, that is right. Do you find it, Judge? It begins with "This third horseman, John Fletcher."

Mr. Gertz: That is not one of our quotes.

Mr. Martineau: Oh, yes, it starts earlier, doesn't it? It starts over in column 1 with "Now, some seven to ten minutes after Booth crossed into Maryland".

Mr. Reuben: It really starts here.

Mr. Martineau: It actually starts up at the top of column 2. That is where the story begins, really, doesn't it?

Q. Do you find it, Doctor? Have you read it over, Doctor?

A. Yes.

Q. Do you think that in his treatment there Millard steals that from you?

A. No.

1480 Q. That is his own idea, isn't it?

A. There is no claim made about that.

Q. No claim at all.

* * * * *

1482 Q. Can we also agree that since you have amended this Section (b) of paragraph 20 to change it to read like this: "That the conspiracy was much more widespread than generally accepted and that it pointed to Stanton," can we agree that Millard does not pirate that conclusion of yours?

A. No, I don't think we can agree to that because 1483 that is the kernel of the nut.

Q. In other words, you feel that Millard says the conspiracy pointed to Stanton?

A. It doesn't say—the whole article is pointed that way, just like you stated my book is; it all builds up to the same probable conclusion. There is no direct statement that I remember in either his article or in my book.

Q. Well, you say there is no statement in your book that the conspiracy did point to Stanton?

A. No direct statement to that effect.

Q. Well, isn't this section in 20 (b) in the affidavit incorrect?

A. No, I don't think so.

Q. Well, let's see, Doctor. You state here what you said was a conclusion: "That the conspiracy was much more widespread than generally accepted, and that it pointed to Stanton?"

A. That is right.

Q. In other words, you state that as a conclusion?

A. The condensed contents of my book, a conclusion, yes.

Q. In other words, you feel that is a fair summary of the condensed context of your book?

1484 A. It is as fair as you can make it in a few words.

Q. Yes, so that we now can agree that that is your main thesis, that the conspiracy pointed to Stanton?

A. Well, it is one of the main, one of the theses.

Q. Yes, one of the theses?

A. Yes.

Q. So that you didn't just ask the question in your book that we discussed yesterday, is Stanton guilty, you asked the question, and then said the evidence indicates that the conspiracy pointed to him?

A. Pointed to him is right.

Q. And can we agree that Millard does not say that in so many words?

A. I agree to that.

Q. He does not point to Stanton?

A. He does not point to Stanton in so many words.

Q. As a matter of fact, Millard gives the thing the treatment, doesn't he, of a big mystery story, a great unsolved mystery? He just asks questions, doesn't he?

A. Yes, he does ask questions, but between the lines he suggests the answers.

* * * * *

1493 Mr. Martineau: Q. You say, then, that by inserting this paragraph in here that Millard also, you feel, points the finger of suspicion at Stanton?

A. Yes, sir, distinctly so.

Q. And you say you do the same thing?

A. I do less directly than he does.

Q. So that he differs from you in that respect?

A. If I may put it this way: He is more brutal about it than I am.

Q. Well, he is more brutal, but if he is more brutal then, of course, he differs from you, doesn't he?

A. Well, no, he is just putting the thing in stronger language.

Q. Where else is Millard more brutal in pointing the finger at Stanton than you are?

A. Nowhere. I don't know that he mentioned this particular thing any place.

Q. Well, do you agree, then, that in this regard
1494 Millard differs from you?

A. All right, I will meet you. I will say that I have never called him a weasel-souled man, that he uses much stronger language than I ever did.

Q. Well, of course, those are just unpleasant adjectives, aren't they?

A. Well, it is language, it is more brutal janguage.

Q. So that you don't claim that Millard stole that language from you?

A. Oh, no, I don't even know what kind of a soul a weasel has.

* * * * *

1497 Q. Well, I grant you that, but doesn't Millard all the way through, and doesn't he end by saying "America's Greatest Unsolved Murder Case"?

Mr. Gertz: Jack, may I interpose something so that the record is accurate? Can't we agree that the title of the Millard article was not the title selected by Millard?

Mr. Martineau: Exactly. I was going to go into that. You are entirely right.

1498 Mr. Gertz: It was given by the magazine editors.

Mr. Martineau: You are right, entirely right.

Mr. Gertz: I didn't want the implication that this was Millard's title.

Mr. Martineau: Millard's title was, as I recall it, "History's Maddest Murder."

Mr. Gertz: I have forgotten, but it wasn't the title given to us by the editors.

Mr. Martineau: In other words, Millard's original manuscript presented it as a crazy murder.

Mr. Gertz: I am only talking about the title, Jack, I am not going beyond it.

Mr. Martineau: You don't want to go beyond it. Don't you want to discuss it?

Mr. Gertz: Not at this moment. We don't want to argue the thing.

* * * * *

1499 Mr. Gertz: Well, I am entitled to make perfectly proper points. You stated it was Millard's title and you are stating—

Mr. Martineau: Let me put it this way: You are interrupting my cross examination to ask me something, will I agree to it. In doing this you are interrupting the cross examination.

Mr. Gertz: Because your cross examination was on that very point, and I am within my rights and I don't have to apologize where the point of your question is assuming a fact that isn't so.

* * * * *

1500 Mr. Martineau: Look, I am not touchy at all. My point is this: I heard all this screaming about the length of the cross examination. Now, I appreciate that Elmer would like to get me to agree to things and at the proper time I will. I do not wish my cross examination interrupted by asking me, will I stipulate, will I agree, will I do this, will I do that.

Mr. Gertz: That was the proper time.

Mr. Martineau: My mind is on the cross examination and I want to keep it there.

The Master: I think you are absolutely right. You can make your stipulations and your agreements later on.

Mr. Gertz: Except this, your Honor. The very question that he was proposing assumes something in the record, and I had the right to say something on it, and I don't see why I have to be called on it by Mr. Martineau.

Mr. Martineau: Just object.

Mr. Gertz: And we have, both of us, very informally,

and every once in a while Mr. Martineau objects to the informality.

Mr. Martineau: Who is getting touchy now? The
1501 thing that I object to is that I know there are going to be all sorts of piteous cries like, Martineau is delaying by the length of the cross examination, that I can tell, and it is being extended by the interruptions.

Mr. Gertz: I haven't said anything as yet about the Eisenschiml cross examination.

Mr. Martineau: That is fine.

The Witness: There is a question unanswered, isn't there?

Mr. Martineau: I wouldn't be a bit surprised, Doctor, so let's get an answer and we will go.

The Witness: My answer is this—

Mr. Martineau: You see, Elmer has been pretty good, I have even forgotten what the question is. That shows you how good your lawyer is.

* * * * *

1508 Q. Oh, I see. That is right. In other words, Sandburg came out a year or so after "Why Was Lincoln Murdered?", didn't he, three years afterward, wasn't it?

A. I think it was very closely after the publication of the book.

Q. Was it? In other words, your memory is that he got your oral permission?

A. Yes, sir.

* * * * *

1511 Q. I see. The first one, "Could Lincoln Have Been Saved", that is the one that was in Coronet?

A. Yes.

Q. And the other one in Sentinel?

A. The Sentinel is a weekly magazine.

Q. I mean, that is not a historical journal or anything like that?

A. No, it is not.

Q. Do you remember offhand whether in writing that chapter in The Sentinel did you use the technique of

1512 citing your sources?

A. No, definitely not.

Q. In other words, that was not written in the technical historical field, was it?

A. It was not. It was a chatty affair.

Q. It was more, shall we say, on the popular level, is that right?

A. On the popular level, a speculative article, strictly speculative.

* * * * *

1514 Q. In other words, then, your feeling is that Lloyd Lewis says there was a mystery about a certain facet of the story of Lincoln's death?

A. A certain phase, yes.

Q. Phase and facet?

A. Yes.

Q. Whereas you say there was a mystery about the whole thing?

A. That is right.

Q. And you are the first one that ever did that? Well, do you claim now, Doctor, that you are the only person that has the right to say that there is a mystery about Lincoln's death?

A. If a man digs into my sources and confirms them he certainly has a right to say it.

1515 Q. Had you finished your answer?

A. Yes, sir.

Q. But your feeling is, or your claim is, that unless a subseqnent writer goes back to your original sources he

has no right without your permission to state that there was a mystery about the death of Abraham Lincoln?

A. I would say the answer is he has no right.

* * * * *

Mr. Martineau: Would it be your claim, Dr. Eisenschiml, that without getting your consent no subsequent author has the right to state the facts or factual material mentioned in paragraphs 19 (a) to 19 (ii) either as written in your affidavit or as amended?

1516 A. As amended I would say he has no right.

Q. Yes. Then the answer to my question is, you do so claim?

A. I do so claim.

Mr. Martineau: I mean I want to be perfectly fair to you and let's get the record straight.

Mr. Gertz: When we say "amended" we mean as amended by the way Dr. Eisenschiml pointed out.

Mr. Martineau: That is right.

Q. As amended yesterday under Mr. Gertz examination.

Mr. Gertz: Yesterday or the day before.

Mr. Martineau: And the ones we have been over now.

The Witness: That is right.

Mr. Martineau: Q. And to carry it one step further, do you claim that unless the subsequent author either gets your permission or goes back to your original source material he has no right to state the facts which you have stated here in your affidavit, pages (a) to (ii), and by that I mean as stated or as amended?

A. I agree to that.

Q. You so claim?

A. I do.

* * * * *

1518 Q. Do you claim that you are the only person, the only writer, who has the right to say that the radicals and Stanton stood to gain much by Lincoln's death?

A. Yes.

• • • • •

1525 Q. Can we agree on this: that Lloyd Lewis does say that after Lincoln was killed the radicals were very happy?

1526 A. Yes.

Q. But you say that he doesn't anywhere say that as of before he was killed they didn't stand to gain by Lincoln's death?

A. That is a very fair statement.

Q. Is that fair enough?

A. Yes.

Q. And if anyone can infer from the fact that after the event they were happy that before the event they would stand to gain by his death, well, then, let them infer it, you say?

A. That is right.

• • • • •

Q. I guess we have covered most of item (d) of paragraph 20 and let me just ask you this routine question: Do you claim, Doctor, that no one has the right to say without getting your permission "That Booth was being protected by some high personage," and I am going
1527 to break up the rest of that, that is in paragraph (d) and I will take the other half later?

A. I will have to repeat what I said before: that unless he goes to my sources and confirms them or quotes me with my permission he has no right to say that.

Q. Well, Lloyd Lewis did say that, though, we found, didn't we? Didn't he suggest that Booth was being protected by a high personage?

A. We agreed, I believe, that it pertains only to the bridge incident.

Q. But he did say it, didn't he?

A. Up to that point we went together.

* * * * *

1531 Q. Then do you claim, Doctor, that in regard to this literary property to the effect that Booth was being protected by some high personage, do you claim that this property includes protection by higher-ups for everything but that bridge incident, you remember, which Lewis talks about?

A. Yes.

* * * * *

1535 Q. Somebody knew where Booth had gone or said he did?

A. Yes. That is not a historical known fact, or was not a known fact, or was not described in any book prior to mine.

Q. I see. So that one you claim?

A. I do.

* * * * *

1536 Q. In other words, that is another one of those things you dug out from your research?

A. Yes, sir, the telegrams are on record where the troops were sent, but nobody ever tied it up in a bundle showing that the directions were false.

* * * * *

1542 Q. I think we skipped (f) there, haven't we?

You claim, Doctor, that no one has the right, without your permission or without going to the original sources to state why the wires out of Washington went out of commission during the night of April 14, 1865, is that right?

A. With the emphasis on the "Why", I say yes.

Q. Yes. Let's break it down briefly. The fact that the wires from Washington did go out of commission on the night of April 14, 1865, that is a historical fact?

A. That is in the public domain.

Q. Yes. That didn't require any research, did it?

A. No, not at all.

Q. No, but no one before you, you claim, ever gave his theory as to why they went out of commission?

A. That is correct.

1544 Q. Your point is that you took that material in the public domain, that I have just mentioned, and you added further evidence to it, that is one thing you did, isn't it?

A. That is one thing I did.

Q. Then the second thing you did was to interpret it and tell why this happened?

A. That is correct.

1547 Q. And you use this as a piece of evidence to show that Stanton was trying to let these murderers escape?

A. That is right.

1548 Q. So you put the finger on Stanton right there, didn't you?

A. That is right. This is part of my, I think I call it, attempted indictment.

Q. Of Stanton?

A. Of Stanton, yes.

Q. In other words, there you come out pretty flat-footedly and say Stanton did these things?

A. He did these things.

1560 Q. Millard leaves it a mystery, doesn't he?

A. Yes, sir.

Q. Do you leave it a mystery?

A. To a lesser degree, yes.

Q. He leaves it a real mystery, an unsolved mys-
1561 tery, an unsolved mystery, and you say that Stanton ought to answer it, is that it?

A. That is close to it, yes.

* * * * *

Q. Or something. Did you make a tabulation of the differences between Millard and you?

A. No, I did not.

Q. Are there any differences?

A. Yes, sir.

Q. In statements of historical fact?

A. There are quite a few parts of his article that I wouldn't consider anywhere infringement.

* * * * *

1562 Q. So that could you agree with me that as far as you know of your own knowledge or as far as you have any opinion Millard did independent research
1563 on these parts we speak of?

A. Well, call it that, yes.

* * * * *

1568 Mr. Martineau: I don't have before me that original manuscript—of course, we will introduce it in evidence—you remember, Millard's original manuscript where we discussed it somewhat this morning, the title being "History's Maddest Murder," or something like that?

* * * * *

1569 Q. Well, I suppose we could agree that the connotation of history's maddest murder or the maddest hour or anything certainly suggests to the reader the idea of inexplicable insanity, or something that doesn't make sense, doesn't it?

A. I would say horror.

Q. And if it is mad it would be something that
1570 didn't make sense, don't you think the reader would get that impression?

A. Or madness is also usually connected with horror.

Q. Yes. Well, considering madness in the sense of something that is insane, that doesn't make sense, which we can agree is certainly one of its uses, isn't it?

A. It could be interpreted that way.

Q. You weren't suggesting anything like that in your book, you were suggesting that this murder made a great deal of sense in a dire sort of way, weren't you?

A. This goes into semantics. Unless you insist I would rather not argue it.

* * * * *

1571 Q. I see here in paragraph 21 you claim that Millard made some historical errors, don't you?

A. Yes, sir.

Q. You claim he made nine historical errors, is that about right?

A. That is right.

Q. In paragraph 21?

A. There may be more, but there is no necessity of—

Q. You set these out here?

A. Yes.

Q. Well, whether they are errors or not, can we agree that at least here Millard didn't get this material from you?

A. I agree fully.

Q. You not only agree but you proclaim that, don't you?

A. Proclaim.

Q. I see you say here—this one has always fascinated me about the gimlet hole.

A. Yes.

* * * * *

1575 Q. Therefore, so we get squared away here and see what our different positions are, you say that by a reasoning process no one could see any more by looking through that hole than the back of Lincoln's chair and possibly a little bit of the back of his head?

A. That is what my opinion is.

Q. Yes, and you say further, then, that Booth could not, as Millard says, "look through the gimlet hole and see the occupants of the box in their places"?

A. That is right.

* * * * *

Q. But isn't it true that other historical writers have spoken on this subject?

A. Yes. I know of one.

Q. Who is that one?

A. Townsend.

Q. And Townsend agrees with Millard, isn't that true?

A. That is right.

Q. And Carl Sandburg agrees with Millard, too, doesn't he?

1576 A. I haven't seen that.

* * * * *

1577 So there he sure does agree with Brother Millard, doesn't he?

A. I think Sandburg's poetry got the best of his good judgment. I maintain that none of us are experts on what you see through a gimlet hole, and we will have to use our commonsense on that.

* * * * *

1578 Q. Doesn't Oldroyd hit the gimlet hole?

A. I don't think so, but it is really of such small importance.

Q. Well, can we agree that that isn't such a bad historical blunder by Brother Millard?

A. It is a blunder which evidently has been shared
1579 by others. I still maintain that they didn't think it through very carefully.

Q. Well, we can agree that Millard got that from others, then, not from you?

A. Oh, yes.

Q. And so to that extent, whether a blunder or not, in describing what you could see through that gimlet hole, to that extent at least he indulged in research from others than yourself?

A. Right.

Q. Right?

A. Yes.

Q. Doctor, in this paragraph 21 you set forth some other things that you say were historical errors and which we can agree Millard did not get from you, I guess you said that, didn't you?

A. I agree fully to that.

Q. Good. So that whether they be errors or not, you think they are errors and I won't go into that now, whether they be errors or not he either got them from his imagination, the facts stated here, or from some other historical writer, can we agree to that?

A. I agree with you.

Q. As far as you know. And so that here are
1580 some instances where he at least may have indulged in other research, is that right?

A. Yes, sir.

* * * * *

1584 Mr. Martineau: Q. When did that article first come to your attention, Dr. Eisenschiml, "The Devil's Errand Boy"?

A. I think Ralph Newman of the Abraham Lincoln Book Shop called me up. I am not a reader of magazines. I am not a reader of True magazine.

* * * * *

1586 Q. Doctor, you heard all the testimony of Dr. Riddle concerning the alleged parallelisms, did you not?

A. I did.

Q. And you heard his testimony about whether in any given instance, which we discussed in the record with Dr. Riddle, there was or was not language copying by Millard of your works in the opinion of Dr. Riddle?

A. I heard that.

Q. Do you remember his testimony on that subject?

A. I don't remember it exactly.

Q. Well, I mean you heard it?

A. Yes.

Q. As you listened to his testimony I wonder if you could say whether or not you agreed with Dr. Riddle on his opinion as to the instances in which Millard did or did not copy your language?

A. We are talking about treatment now?

Q. Well, first I was going to take up language
1587 copying.

A. Language copying.

Q. Or if you want to treat them synonymously, okay.

Mr. Gertz: I thought we were, Jack.

Mr. Martineau: Okay.

Q. Language or treatment copying.

A. I think I would have gone farther than Dr. Riddle in some instances.

Q. In other words, you feel, Doctor, that there are some instances in which Dr. Riddle, we will say, may have said that there was not language or treatment copying?

A. Or very slight.

Q. Or very slight, where you would feel that there was?

A. There was stronger.

Q. Yes, stronger?

A. Yes

Q. Now, as to the differences the record will show, of

course, some instances in which Dr. Riddle said that in his opinion there was not language or treatment copying.

Mr. Gertz: Or slight.

Mr. Martineau: Q. Or slight. I want to call
1588 your attention to the ones where, as the record showed, he said there was not, in his opinion, any language or treatment copying. Do you have any instances where you disagreed with him as to instances of alleged copying or non-copying?

You see, I am trying to save time, Elmer.

Mr. Gertz: Yes, I appreciate that.

The Witness: Meaning that at times he said no infringement?

Mr. Martineau: Yes.

A. And I would say yes.

* * * * *

Mr. Martineau: Q. Do you recall what it was? Maybe we can help you.

A. I think I remember quote 59.

* * * * *

1594 Q. Yes. Well, do you think now that you have looked these over this morning that you rather closely paralleled your source there, Gideon Wells?

A. Yes, I do.

Q. Well, you necessarily had to since you are reciting a fact of history, didn't you?

A. That is right.

* * * * *

1598 The Witness: I have here one on page 466. I start on 465:

"Mr. Martineau: Q. As I understand it, then, Doctor, and let's see if I state this fairly, we can agree that Lieutenant Baker quoted in a book written long before either Eisenschiml or Millard, 'only one door of the barn was open'?

"A. Oh, yes.

"Q. That was a public statement, was it not?

"A. Yes."

There is a mistake all the way through here. It was not written in a book. This is in the Riddle papers.

Q. Oh, the Albert Gallatin Riddle papers?

A. That is right.

* * * * *

1599 Q. But your point is that it wasn't in any standard historical work?

A. That is exactly what I meant, yes.

* * * * *

1600 Q. Incidentally, before you pass that, do you recall it was recorded in the Albert Gallatin Riddle papers this statement about the barn door: What did Riddle purport to be recording, do you recall, Albert Gallatin Riddle?

A. Shall that go into the record?

Q. If it isn't too much, yes.

A. Albert Riddle was the personal attorney for Lafayette C. Baker.

* * * * *

1601 Q. But can we pinpoint that to this door business?

A. That one door.

Q. It is quote 51.

A. 51 is right.

* * * * *

1606 Q. You mean the fact appears nowhere but in the Riddle papers?

A. That is right, that only one door was open.

Q. Which Riddle papers you have said you researched out and arranged and so forth?

A. That is right.

* * * *

Q. In Baker's book at page 536, that is, General Baker's book, do you recall whether or not there is a letter from Conger and Lieutenant Baker which refers only to one door of the barn?

1607 A. It may be so.

Q. I mean, if that were so—

A. I may be wrong about the fact. I think I will retract that statement. I think it is the literal quotation that I had in mind on 51.

* * * * *

1608 Q. Doctor, do you want to get on to quote 13?

A. Quote 13, page 472 of our record here. Dr. Riddle says, "A very slight coincidence of language there."

* * * * *

The Witness: I say it is very pronounced. Maybe Dr. Riddle misunderstood the question, I don't want 1609 to impute any motives to him that I don't know anything about, but to me, if I may read the comparison, I cannot possibly say that this is a slight coincidence of language.

* * * * *

1612 Q. The squawking of ducks, I believe, is mentioned in George Bryan, is it not, in Bryan's "Great American Myth"?

A. Yes, I believe it is.

Q. Do you feel that Bryan stole from you, too, in 1613 "The Great American Myth"?

A. I feel very strongly on the point but I don't want to say exactly what he did.

* * * * *

Q. In other words, you don't know of your own knowledge that Millard got this part from you rather than Sandburg, but you feel that he is closer to you than he is to Sandburg in his language?

A. That was Dr. Riddle's opinion.

Q. Yes.

A. And I agree with that part of it.

Q. Yes. What part of it don't you agree with, then? You remember you said that Riddle didn't go far enough or something.

A. That is right.

1614 Q. I thought we were covering the things where you didn't agree with Riddle?

A. I do not agree with him on this particular point, on the "slight coincidence."

Q. I see. You don't agree with his characterization?

A. That is right, I think it is a distinct coincidence.

Q. Okay. Any more you want to say on this one now?

A. No, I do not.

. . . . . .

1621 Q. Okay. What is the next instance, then, where you feel Dr. Riddle didn't go far enough?

A. Excuse me a minute. I hasten it as much as I can, but I wasn't prepared . . this.

Q. That is all right, take your time.

A. Ah, please.

. . . . . .

1624 Q. Yes, and you stated the fact of history in just about as terse a way, with as few words as possible, and so did Millard, didn't he?

A. That is right.

Q. Millard said "even" where you said "even"?

A. That is right.

Q. And then he went on and added, "and quite probably was paid for his testimony". You didn't suggest that, did you, in your book?

1625 A. Yes, I think I did, but I didn't use it here.

Mr. Gertz: Elsewhere.

Mr. Martineau: Q. All right. That is your feeling anyway, you feel that that is language copying, you differ from Dr. Riddle there?

A. That is right.

1631 Q. Are there any other instances in which you don't agree with Dr. Riddle?

A. I hope not because it takes time.

1636 Q. Okay. I think you testified that you bought a copy of True magazine for February 1953 which I think you call the infringing copy —

Mr. Gertz: Yes.

Mr. Martineau: Q. When did you buy it last, did you say?

A. On November 5.

Q. Of this year?

1637 A. Of this year.

Q. Where did you buy it?

A. From the ABC Magazine and so on Company.

Q. Where is that company, do you know?

A. Here in Chicago.

Q. Did you write them or call them up to see if they had it in stock or—

A. I had my secretary order the copy. I told her to get me a copy and she called up various people and these people said they could get them.

Q. I mean, did you understand that it was procured as something right from their stock or as sort of a back number, as supplying a back number?

A. I couldn't tell you that.

Q. In other words, all the information you had about that was just hearsay, your secretary took care of this matter?

A. That is right.

Q. And then she told you, she reported to you?

A. Yes.

Q. So I mean you are not prepared to say whether or not she was told by this ABC Company that this was a back number and they would try and find it for her, or whether it was regularly in stock, you wouldn't know

1638 about that?

A. I would not know.

Q. So that when you testified that you bought this magazine you really mean your secretary bought it?

A. Well, I paid for it so I bought it.

Q. Well, I mean—

A. She really was the agent for me.

Q. Yes, but I mean, you don't know any of the facts of your own knowledge as to the alleged purchase of it?

A. I do not, no.

Mr. Martineau: In that case, then, I just make a formal motion to strike the testimony out, the doctor's testimony out, about the purchase of True of February 1953.

The Master: I will let it stand subject to the objection.

* * * * *

1639 Q. Doctor, other than your testimony that you said you engaged Ralph Newman as an agent to be concerned with the publication of either one or both of your two books, other than that you don't know of your own knowledge anything that Mr. Newman did in connection with any publishers, do you?

A. I do not.

* * * * *

1641 Q. I mean, you wouldn't have the Court believe that you know of your own knowledge that Millard is just a hack writer and is not himself quite interested in the Civil War period?

A. I make no such observation.

Q. No. In other words, as far as you know or, to the

contrary, Millard may be himself sincerely and passionately interested in this Civil War period?

A. I think he is.

Q. Just as much as you yourself are or Mr. Gertz?

A. I think he is very much interested.

Q. And as I myself have come to be?

A. Yes, sir.

Q. Let me see if I understand your testimony about this Chiniquy book, Doctor.

A. Yes.

• • • • •

1646 Mr. Martineau: Q. In other words, you exactly parallel Chiniquy in speaking of "and in the houses of the priestly and Rhonish town of St. Joseph, Minnesota," you exactly lift that language from Chiniquy, don't you?

A. I did.

Q. Then he goes on, Chiniquy, and says: "There
1647 were no railroad nor any telegraph communications nearer than 40 or 80 miles from the nearest station," and you say, "and there was no railroad nor telegraph communication nearer than 40 to 80 miles from the nearest station to St. Joseph."

You lifted that directly from Chiniquy, too?

A. I did.

Q. Now, you feel that because Millard didn't mention the 80 miles and stuck in the description of St. Joseph as "the little village," you feel that that proves to you that instead of going to Chiniquy, as he testified—I think I state that fairly.

Mr. Gertz: Yes, he said that.

Mr. Martineau: Q. —that he lifted it from you and was trying to conceal his piracy or his copying?

A. I don't think it proves it to me.

Q. I mean, that is your—

A. It indicates.

Q. It indicates it to you?

A. Yes.

Q. But it doesn't prove it to you, does it?

A. No, it doesn't prove it.

• • • • •

1650 Millard: "'Have you heard the news? Abraham Lincoln has been assassinated. That's right—murdered by a pistol shot.'"

Q. There is nothing like that in Chiniquy, is there?

A. There is nothing like that in Chiniquy.

Q. Well, I suppose that is like a little poetic license, the use of a little poetic imagination from Millard, isn't it?

A. Yes.

Q. He did not life that from you, did he?

A. No, he did not lift that from me.

• • • • •

1651 Q. That is right. He cites no authority for it and it certainly would be classified as use of the imagination, wouldn't it?

A. I think he is perfectly justified in livening up a sentence there for magazine use.

Q. For popular use?

A. For popular use.

Q. Whereas in a standard historical work like either of your two books or other of these historical works we have referred to that wouldn't be considered very good form, would it?

A. It would not be tolerated.

Q. It would not be tolgrated at all?

A. No.

Q. That is the difference between popular writing and scholarly writing, isn't it?

A. That is right.

• • • • •

1652 Q. Not on this one? Did I understand you to say, Doctor, that this 27-A, Plaintiff's Exhibit 27-A, which is a transcript from an article in the Whig Press of Middletown, New York, April 19, 1865, that you felt from this, from the date on this, that Millard had lifted his quote number—

Mr. Gertz: 3, I think it is.

The Witness: 3, yes.

1653 Mr. Martineau: Q. —his qoute No. 3 from you rather than from going to the original source, is that right?

A. Yes, I do.

* * * * *

1656 Mr. Martineau: Q. So you feel that your sentence here may have been a little bit obscured, a little clumsy?

A. It was involuntarily obscure because to be historically correct I tried to copy the original as much as I could.

Q. Yes. Well, in other words, for whatever reason, you feel your sentence was obscure and by some might be thought to be clumsy, and that Millard in effect was deceived by what you now say was your obscurity or clumsiness in copying from that other note?

A. I think that is so.

Q. I just want to get your reasoning on it. Now, in this instance it was a fact of history and so presented by you, wasn't it, this business about what the Middletown Whig Press published?

A. That was straight history.

Q. Straight history as far as you are concerned, there wasn't any use of your imagination there, or fiction, was it?

1657 A. No, no fiction.

Q. And you presented that as a fact of straight history?

A. As a fact as reported.

Q. As reported?

A. That is right.

Q. But I mean, when you wrote this in your book you wanted to add that to the sum total of history knowledge, didn't you?

A. I would put it this way: I reported it as a historical curiosa. It has nothing to do with anything. It just is a curious fact that three or four towns would report this or rumor it before it happened.

Q. Yes.

A. That was all the object I had.

Q. But I mean, you printed that as the truth for whatever historical value it had?

A. That is right.

Q. And in so printing it in your books or publishing it you intended to add that to the sum total of human knowledge?

A. I don't think I intended it. I think I added it.

Q. Yes, but aside from this question of your research and all that, and crediting, you didn't wish or want it to be thought that after you added that or published this
1658 business about the Middletown Whig Press that no other subsequent writer could say the same historical fact that you had certified—

A. He certainly could—

Q. —without getting your permission?

A. That is right, unless he went to the original papers.

Q. In other words, unless he went to the original papers, he would have to get your permission?

A. Yes.

Q. Before he could state this fact?

A. I am convinced of that.

Q. I suppose all the way through here, Doctor, just as a sort of a blanket question, your treatment of all these sixty-six or sixty-seven different items we have been discussing these many days, whenever you made a statement of a historical fact in any of your books and cited your sources you were tempted to parallel your sources as closely as you could, didn't you?

A. When I quoted directly, I did.

Q. Yes. Well, I mean if you quoted directly you were tempted to parallel the source and the language if it was in the public domain, didn't you?

A. Yes.

Q. And if you just simply cited an authority then
1659 you at least attempted to parallel the facts stated in that authority?

A. And also the language, if it was possible for me to do so.

* * * *

1661 Q. Yes, that is what I say. And do you have quote No. 9 there, Doctor?

A. I have it.

Q. Can we agree that you closely parallel your source there?

A. Yes, I do.

Q. Moorefield Storey?

A. Yes, I do.

Q. In fact, your language is very similar to Moorefield Storey there, isn't it?

A. Yes, I think so.

Q. Don't you think it is fair to say that your language is closer to Moorefield Storey in this instance than Millard's language is to your language?

A. I would say so on a cursory glance, yes.

* * * *

1663 Q. In other words, do you feel here that he just used that poetic license involving the servant just in order to cover up the fact that he didn't read the original source and try to make it different from yours, to sort of cover his tracks, so to speak?

A. I would say so, yes.

Q. That is what it indicates to you?

A. Yes.

Q. But you don't know of your own knowledge that Millard did not in this instance read the original source?

A. I do not know.

Q. And we agree that you were closer to the original source than Millard is to you?

A. Well, when I read it over I think it is even-steven.

* * * * *

1664 Q. And you say that the news which Stanton received on this occasion was the news of the assault on Seward, is that not true?

A. That is true.

Q. Millard says that the news which Stanton received was the news of Lincoln's assassination?

A. Yes. Of course—

Q. Those are two different things, aren't they?

A. There is one more sentence to follow my own quotation: "That the news of Lincoln's assassination was conveyed to Stanton later."

Q. Read the next sentence.

You read it, Elmer. You probably should have had that other sentence anyway.

Mr. Gertz: Yes. In trying to shorten it . sometimes shorten it foolishly. The immediate sentence following is:

"Of the attack on Lincoln he was not apprised until 1665 later", and at that point the source mark is indicated.

Mr. Martineau: Yes.

Q. Now, right there you and Millard are in flat contradiction of each other, aren't you?

A. So far as the servant is concerned, yes.

Q. I mean, so far as the news which Stanton received at that time, aren't you in contradiction?

A. I think—

Q. Because you say that he didn't get the news of Lincoln's assassination until later, when Millard says that a servant burst in with the news of Lincoln's assassination?

A. I think that Millard telescoped this, as you remarked the other day. You have got expressions in which are very picturesque.

Q. Thank you, Doctor.

* * * * *

1669 Q. Yes. In other words, you mean he added a fictional touch?

A. A fictional touch.

Q. Writing on the popular level and—

A. That is right.

Q. —and not to a society of scholars, as you were, is that right?

A. That is right.

* * * * *

1670 Q. It is just hearsay. Well, I guess we can agree that in your expert opinion Carl Sandburg very closely paralleled you in his treatment of the John F. Parker story, didn't he?

A. That is right.

* * * * *

1671 Q. Let's just get that straight, now. Is that No. 17?

A. That is right.

* * * * *

Q. In other words, you feel that the historical facts are not in dispute, but that you feel in expressing the
1672 same characteristics or opinion in substance that you did that Millard must have lifted the whole thing from you?

A. It looks very much like it.

Q. Yes. Is it possible in your opinion as an expert that he got the facts from the original sources and liked your opinion so he lifted your opinion, would you say that was possible?

A. Mr. Martineau, there are no facts, it is an observation.

Q. No, but I mean the other facts?

A. Oh, yes, the other facts.

* * * * *

1673 Q. Now, quote 21, I think you said, you found—

A. Quote 21?

* * * * *

1674 Q. Well, do you find any internal evidence that Millard copied you rather than getting what he says about quote 21 from the original source?

Mr. Gertz: Jack, he says the original source is "The Great American Myth" by Bryan, that is the point.

Mr. Martineau: Whose original source?

Mr. Gertz: Millard in his card—

Mr. Martineau: He also gives Sandburg.

Mr. Gertz: He also gives Sandburg.

Mr. Martineau: Yes. That is what I wanted to get straightened out. In other words, Millard did give Sandburg as an addition.

The Witness: As one of them, yes, and since this is a Parker reference I claim that Sandburg took it almost verbatim from me, as he said he would.

Mr. Martineau: Q. But I mean, you don't deny that Millard may have gotten it from Sandburg as well as you?

A. I do not deny that, no.

1675 Q. Now, quote 26, let's see what you said about that, that is the Gleason story?

A. Yes.

1678 Mr. Martineau: Q. Well, do you claim that Millard in this instance stole your language or lifted your language?

A. He very closely paralleled it.

Q. I just wanted to get the claim on it.

A. That is right.

Q. Is that the claim here?

A. Yes.

Q. You admitted that Millard may have read the original source, which was Gleason, but your point is that he, you think, paralleled your phraseology?

A. That is it.

1680 Q. Quote 36.

1682 Mr. Martineau: Q. Yes, all this is confined to the first paragraph, and you parallel not only the historical facts in this instance but the language as well of these other authorities?

1683 Q. I see. So that the situation is that you paralleled your original sources, both as to facts and
1684 language and Millard paralleled you, you say, as to facts and language?

A. Yes.

Q. Does that state it fairly?

A. Yes.

Q. And you feel or do you see any internal evidence there that Millard copied from you or paralleled you, how-

ever you want to use the phrase, rather than going to the original sources?

A. Not in this paragraph.

Q. Not in this paragraph?

A. That is right.

Q. He may have gone to the original sources as far as this paragraph is concerned?

A. He may.

Q. Okay. Now, is there something else in this quote 36—

A. Yes.

Q. —which indicates to you that Millard did get it from you and not from the original source?

A. That is right, in the second paragraph

* * * * *

1688 Q. I just wanted to get your thinking on it. Now I have got it. In this same connection you quoted Oldroyd, page 68, line 5, "Major O'Beirne and one man", and so forth, do you remember that?

A. Yes, I do. That is one of the quotes—

Q. Then you read Baker's "History of the Secret Service" where Baker quoted Townsend?

A. That is right.

Q. Just to characterize the thing rapidly—

A. And also Clara Laughlin. Those are the three books—

* * * * *

1689 Q. The authorities which we just mentioned a moment ago said only, "He was refused permission to go to Virginia", or "to chase Booth into Virginia", and I just say that in substance?

A. That is right.

Q. And none of them say anything about "ordered to remain on the Maryland side"?

A. I agree.

Q. So your point there was by a process of elimination you are showing that Brother Millard couldn't have gotten that expression out of any of the other authorities so, ergo, he must have gotten it from you?

A. That is right.

Q. Now, quote 39, that is where you read from the Diary of Edward Bates, do you remember?

A. Yes, sir.

* * * * * *

1690 Q. And your argument was that inasmuch as you plucked that one out and set it down and then Millard just by happenstance plucked out the same one and set it down as the part that he selected, supposedly, of what Mr. Bates had to say about this opinion, your argument ran that it was a strange thing that he just picked out the one, the same one you picked out?

A. That is exactly right.

Q. Ergo, he must just have lifted it from you and not have read it in the original source?

A. Yes.

Q. Do I state that fairly now?

A. Yes, you do.

Q. Now let me see if I understand this. You picked that out, that part of Bates' opinion because to you
1691 that summarized the whole thing that he had to say about this business, didn't you?

A. No, Mr. Martineau. It was one out of several quotable quotes, and I just flipped a coin and took that one. I read the other one into the record, and you will see that they are very quotable and express similar feelings.

Q. I see. I just wanted to get your thinking on it. And when Millard picked out the same one you feel that that indicates to you that he must have copied it from you and not have read the original source?

A. Yes, but—

Q. But you don't exclude the possibility, Doctor, do you, that Millard had read the original source and also read you, as he admitted, and then said—

A. I do not exclude the possibility.

Q. And then said, "I liked Dr. Eisenschiml's quote"?

A. I do not exclude the possibility.

Q. Yes.

* * * * *

1692 Q. Let's get to the other part of it here, about Orville Browning. What is the argument on that?

A. The argument is that for once I left out the middle name of a man, Orville Browning. Incidentally, Edward Bates has no middle name. I usually, at least, make the "H" there, and for some reason or other I didn't, and he omits him. Then I call him later Secretary of
1693 the Interior. He calls him secretary. He could have been described in various ways, and then he quotes exactly the quote that I took in the same sequence in which I quoted the two.

* * * *

1694 Q. Yes, that is what I say. Now, here again can we agree that Millard may well have read you as he admitted and may also have read the original source, and then preferred the way you handled it?

A. Yes, sir, so far as we are in step.

Q. Yes, but I mean, you are not telling the Court that this proves conclusively that Millard never did any leg work or read any original source in this connection?

A. No, I do not claim this.

Q. If he were a sincere Lincoln scholar it isn't at all improbable that even though he could have saved some work by reading you that he would like to fondle the original source, isn't that true?

A. Yes.

* * * *

1695 Q. Now let's get briefly to No. 40 about the tav-
—ern Surrattsville Tavern.

A. Yes.

1696 Q. Concerning the peach orchard and the amount of the lease and so forth and the sheds and the barns?

A. Yes, sir.

Q. From whom did you learn those facts?

A. I had a—it was an 1867 newspaper.

1699 Q. I don't suppose you claim the exclusive right to this, the condition of the Surrattsville Tavern?

A. No.

1700 Q. In the manner in which you have done it here in quote 30?

A. Oh, no, I do not.

Q. I mean, you don't say that anybody has to get your permission to tell about the peach orchard and sheds and the barns and so forth?

A. That is right.

Q. You don't regard that as a literature expert, a significant piece of copying standing by itself, do you?

A. No, I do not consider it as very important except for the significance.

Q. Except for what?

A. Except for the significance.

Q. In other words, you mean except as you would suggest, as a clue that Millard took some language from you, generally speaking?

A. That is right.

Q. That he had access to you, as they say?

A. That is right.

Q. Just a question or two on quote No. 41, Doctor. Do you have it before you?

A. I have it.

Q. Do you remember when that was published, private Miles O'Reilly, "Baked Meats at the Funeral"?

A. May I add something there?

Q. Surely.

A. Which Millard admitted that he did not read.

Q. I disagree with you there, he admitted he did read it.

Q. At any rate, Doctor, you don't regard this as a piece of very significant literary theft, do you?

A. Very unimportant.

Q. Isn't that true?

A. Very unimportant.

Q. Incidentally, that is also in Sandburg, isn't it? Doesn't Sandburg mention that same thing?

A. I don't remember that.

Q. I seem to remember reading that in Sandburg.

A. It is possible.

Q. It is certainly mentioned in "The Great American Myth", as I recall, isn't it, on page 62, around there, when he is talking about the guarding of Lincoln, and how Lincoln was always going over to General Halleck's headquarters protesting about the cavalry squad. You don't recall that?

A. I do not.

Q. Now, 47, the one about the boat, where they wanted to go south so they could go north.

Mr. Martineau: Q. Let's see how we can briefly state this. As I recall it, Doctor, after pointing out that business you did from the map on page 92 of your book which I won't bore you with now, I just wanted to see if I can get the thrust of your argument. Your

point, as I recall it, was that nowhere except in your book does it appear Herold said, either admitted or proclaimed or confessed or asserted to Dr. Mudd that the reason they wanted to get to the Potomac was so they could find a boat going north, do I state that correctly?

A. Yes, sir, and I am very positive on my answer that it does not appear anywhere.

Q. What is a fair summation, then, of what the other, prior authorities say?

A. I don't think they mention this incident at all. They mention—

Q. About Dr. Mudd?

A. They mention the call on Dr. Mudd and all that, but that is as far as they go.

Q. And what was your authority for your statement?

A. The original archives.

1708 Q. When you published that, Doctor, in "Why Was Lincoln Murdered?", the material quoted in quote 47, you intended, naturally, to publish that as a historical fact, didn't you?

A. Oh, yes.

Q. And you intended to add it to the sum total of 1709 human knowledge, I presume?

A. Indirectly, yes.

Q. Now briefly on quote 54.

A. Yes.

Q. You say in "Why Was Lincoln Murdered?", page 179, paragraph 2, the last two lines:

"To Mrs. Surratt in all likelihood a promise of clemency was held out."

As I understand it, you said that at the time you 1710 wrote the book you didn't know of certain facts which you discovered later, and therefore you simply stated that as a probability?

A. Yes, sir.

Q. The fact that clemency was held out?

A. You have it correct.

Q. Whereas you discovered something later from a newspaper, the Washington Gazette, which you mentioned, which quoted Col. Wood of the Capital Prison, wasn't he?

A. Yes, sir.

Q. And therefore when you wrote "In the Shadow of Lincoln's Death" you could state positively as a fact that the promise of clemency was held out to her?"

A. And I did so.

1711 Mr. Martineau: That is it.

Q. How does Millard state it? He states it at page 119, column 2, the last four lines:

"Only Mary Surratt was left unhooded, but she was even more exquisitely tortured by having the hope of reprieve dangled before her and then snatched away until at least her reason broke under the strain."

Now, do you feel that that indicates to you that Millard lifted that from you rather than from original sources?

A. Yes, I think so.

Q. I think he mentioned some original sources in his deposition, didn't he?

A. Yes. The original sources that he quoted pertained to the time after the sentence had been pronounced.

1714 Q. But can we agree on this, though: That the fact that clemency was held out to her, whether that was torture or characterized as torture or not, the fact that clemency was held out to her was a matter of historical fact?

A. No.

Q. We cannot agree?

A. Exactly not. It was not. It was a surmise on my

part, even as late as 1937, and it became a fact with a disclosure of the man who actually made the promise, which is contained in this newspaper.

Q. I see. In other words, she may have had the hope of clemency and her counsel and relatives and friends may have had the hope she would get clemency, but your point is that it is not the historical fact that clemency was actually held out to her, is that it?

A. You have it exactly right now.

* * * * * *

1715 Q. So that, unless Millard can take the alleged conferences of her hopes of clemency and deduce from them that some promise must have been held out, then he hasn't got any authority, is that about it?

A. Apparently so.

Q. That is your reasoning anyway, isn't it? I just want to get your thoughts on it.

A. Yes.

* * * * * *

Q. So that it all turns on the fact as to whether 1716 or not it is a matter of history known to all before your book that a promise of clemency was actually held out to her or not, isn't that right?

A. That is right, and I showed that it was held out.

* * * * * *

Q. I mean, you don't see any significant expression-copying?

1717 A. Not significantly so.

Q. Your point is that he fitted your research?

A. And paraphrased a sentence.

Q. Well, as a historical writer would you say it is not a historical fact that Mrs. Surratt had a promise of clemency held out to her to shut her mouth?

A. I think it is so considered.

Q. You really got a new quote, that thing about the bartender, quote 67.

Mr. Gertz: Yes.

• • • • •

1719 Q. And when you published that in your works, the name of this bartender, Michael Henry, you intended to give that to the world as a historical fact, didn't you?

A. No, you are flattering me. I don't know why it crept into my story.

Q. Or a historical trivia? You were stating it as 1720 a true fact, weren't you?

A. That is right, it was a historical trivia, just as you say. You have very apt expressions, and I am going to copy you freely. For no particular reason did I put it in.

• • • • •

1722 Before Hon. Joseph A. Graber,
Special Master.

Tuesday, March 1, 1955,
2 o'clock p. m.

* * * * *

1730 Mr. Martineau: Now let's see what other matters
1731 we can clean up at this time.

There is this business, Elmer, about these books. We don't want to clutter up the record reading into the record these reference books, but we do, we naturally would have to have them in the record. In other words, the original source materials.

Mr. Gertz: Well, why don't you do this? In other words, you don't want to read particular pages?

Mr. Martineau: Well, as I say, we are perfectly willing to and we are prepared to.

Mr. Gertz: What we could do, if you would extend the same privilege to us, if you want to incorporate them by reference stating the names and authors and editions and which particular pages you have reference to without having to read them it would be agreeable.

Mr. Martineau: As I say, we are perfectly willing to read them in right now, and I am just wondering—

Mr. Gertz: No, you don't have to read them in. I do say you ought to give a list of the books.

Mr. Martineau: Oh, yes.

Mr. Gertz: The authors.

Mr. Martineau: That is right.

1732 Mr. Gertz: The date of publication and the edition, and the particular pages or sections of the book that you want to consider in so we don't have thousands of pages when only a few pages are material.

Mr. Martineau: You are quite right. There is this

problem, your Honor. I have very seldom seen a case, and I am sure this is true of Mr. Gertz and your Honor, too, where we have got so many things dying around in the air, books of which judicial notice may be taken, and it just seemed to Mr. Reuben and myself that somehow we ought to anchor this down somewhere, and while we don't wish to clutter the record up by unnecessarily reading authorities into the record it seems to us that maybe the best thing for us to do, since the burden is on us in this connection, would be to read the pages of these source materials into the record.

Mr. Gertz: The pages themselves?

Mr. Martineau: Yes.

Mr. Gertz: I have no objection to that.

Mr. Martineau: And as a matter of fact—

Mr. Gertz: But I prefer if you simply read the page numbers and we would agree as to what the pages
1733 say, not that I have anything against Mr. Shapiro, the court reporter, but we won't have any unnecessary big court reporter's bill.

Mr. Martineau: Of course, if the books are all easily available that would be a very good procedure, but, for example, when we had to assemble these books to bring over here today, there were a lot of them we couldn't get, again; you have to send out to the University of Chicago for them, and that sort of thing.

Mr. Gertz: Except we know the contents of it, and if you say later your typed copy or other copy is here, we would examine it and then O.K. it.

Mr. Martineau: Maybe we can make copies.

Mr. Gertz: We would like the same privilege.

Mr. Martineau: We can maybe make copies and then, subject to correction, we can agree— in other words, we will make one up almost like an exhibit, you might say.

Mr. Gertz: Yes.

Mr. Martineau: And tender it to his Honor—

Mr. Gertz: And we may object to all or portions, and we will state our objections, whatever it is. In other words, the fact that you don't offer the book itself won't
1734 be a ground for objection. We would waive that particular kind of objection.

Mr. Martineau: Yes.

I suppose what we should do is to at least state for the record the books that we do regard as such source material.

Have you a list of those, Don? Then we can make up this thing as an exhibit.

Mr. Reuben: Why don't I just hand you the books?

Mr. Martineau: That is a different one, I think.

Mr. Gertz: Of course, if you want to do this, Jack: Prepare such a list and submit it to me, we would stipulate it be part of the record subject to whatever objections I would make as to specific things so that you won't have to do it at this moment.

Mr. Martineau: That would probably be a good idea. In other words, I think we should go further than that. I think we should prepare not only the list but the quotations themselves and submit it to you. Does that seem to your Honor to be a sensible procedure?

Mr. Gertz: So the whole thing would be one exhibit.

1735 The Master: I would think that would even be a good time saver, too.

Mr. Martineau: Yes, it would.

Mr. Gertz: And we won't have to have a double check to see if the court reporter got it down accurately or anything else.

Mr. Martineau: That is right. And it would fit the very

purpose that I suggested, and that is to have it all in one place, wouldn't it?

Mr. Gertz: Of course, the record shows I am not necessarily saying it is material. I don't know until I see.

Mr. Martineau: Right. Shall it be understood, then, Mr. Gertz, that we will get our source material exhibit, if I can call it that, ready and submit it to you, and then you can decide what you want to do about it?

Mr. Gertz: Could you do it in about a week, Jack?

Mr. Martineau: Oh, I think we could. Sure.

Mr. Reuben: The big problem is getting the books.

Mr. Gertz: Maybe we can help you. I may have some in my library and Dr. Eisenschiml has some.

• • • • •

1746 Mr. Martineau: Now, No. 8 is a document which was identified in Millard's deposition as Plaintiff's Exhibit No. 5. It purports to be a letter from Otto Eisenschiml under date of July 26, 1946, addressed to Mr. J. J. Millard, and purports to be signed by Otto Eisenschiml. I would just ask you if that is Dr. Eisenschiml's signature?

Mr. Gertz: Yes. Yes, that is.

• • • • •

1749 Q. You refer here to the "digging" done by Mr. Millard. Do you remember what that was about now at this time?

• • • • •

A. I thought that was very interesting. It is not interesting in a general sense, but when you dwell with people as I have done, Mrs. Surratt and all these people, they become live figures to you, you want to know everything you can about them.

Q. Yes.

A. The lieutenant, this Colonel Baker stands be-
1750 fore me as if I know him. Now I know something; I know something I hadn't known before Millard dug it out.

• • • • •

1751 The Witness: I recognize him not so much—that question was not on tap at that time. As a general historical digger, as a man of curiosity, trying to dig out facts, I had that opinion.

• • • • •

Q. In other words, to refresh your recollection, when you wrote those two books you wrote them as schol-
1752 arly works, as a contribution to the sum total of human knowledge?

A. That is right.

Q. To stimulate further research?

A. Yes, and I make practically the same statement in the book itself. I didn't say that because I didn't know yet that I was going to get nothing but abuse.

Q. Well, I will go into that in a minute, but I think you got something other than abuse, didn't you?

A. Yes, from smart people.

• • • • •

1753 Q. A rehashing?

A. That is the basis of this suit, isn't it?

Q. Well, I guess that is what you claim, isn't it?

A. That is my contention.

Q. Yes.

A. And your contention, of course, is otherwise.

Q. Yes.

A. But what I consider rehash is not research.

Q. Well, let's see if we can understand this, then. You contend that Millard just rehashed you or rehashed you and others, other historians?

A. I am not interested in the others, of course.

Q. But you feel that he did rehash you?

A. I do.

1754 Q. Well, we can agree, though, can't we, that he did some other independent research of his own in the piece of which you complain?

A. No, I beg your pardon. I would like to have that pointed out to me.

Q. In other words, sitting here now you can't agree to that?

A. I cannot agree. I never could.

• • • • •

1755 Q. That is right. In other words, what you had seen of Millard's work, the matter you just referred to, had convinced you that Millard did have the curiosity which was the foundation of good research word and the persistency that must accompany it? That was your judgment of his work?

A. That was my judgment after he sent me his work on Baker and Sherman.

Q. Yes, and you, being an experienced scholar in this line did not use this language lightly, did you? That was sincere praise of Millard, was it not?

A. It was sincere praise and encouragement.

Q. Yes, from an older scholar to a younger one.

• • • • •

1756 Q. In scholarly fields, huh?

A. That is absolutely rule No. 1. He would ruin his reputation and be the laughing stock, if not worse, of his colleagues.

Now, involuntarily you imbibe this same principle in anything that you do. Therefore, you find that scientists are the sworn enemies of rehashes; they just despise that sort of work.

Q. In other words, is this a fair statement: that in the scientific field, as you just referred to, if you do any rehashing you tell where you got the rehash from,
1757 before you rehash, is that it?

A. I didn't quite get the question.

Q. I say, before you rehash you tell whose hash it was, is that it?

A. That is right, it is not being done.

* * * *

1759 Q. I see. Just so we understand each other, then, research in your philosophy is going back to the very original sources, the first evidence, so to speak?

A. That is correct.

Q. And rehash is where you take what someone else has said about that original source and maybe quote him or not quote him as the case may be, is that it?

A. I think so, yes.

Q. That is rehash?

A. Yes.

* * * *

1761 I claim that in many instances the Civil War was sort of a thrown ball game on the part of the War Department.

Q. A thrown ball game?

A. A thrown ball game.

* * * *

1762 Q. Doctor, you spoke of being attacked or abused, viciously attacked, for writing "Why Was Lincoln Murdered?" First, did you refer to the review by J. G. Randall of the University of Illinois, among others?

A. I don't recall that one.

* * * *

1764 Q. Yes. In other words, just so we get it straight, you don't agree with his statement that you fitted
1765 the baffling details into the appalling theory that

Stanton knowingly permitted the assassination of the President while protecting Grant, that part you don't agree with?

A. I do not.

Q. Do you agree with this statement:

"The book shows elaborate investigation."?

A. I am willing to accept that.

* * * * *

1778 Q. Would you say it was a fair statement that you did not mean to convey, though, a derogatory imputation against the reputation of Mr. Stanton?

A. Yes.

Q. That we can agree on, can't we?

A. Yes.

* * * * *

1789 Mr. Martineau: I will offer, your Honor, "Re-opening the Lincoln Case," taken from the Saturday Review, New York, Saturday, March 27, 1937, page 10, "Why Was Lincoln Murdered?", by Otto Eisenschiml, Boston: Little, Brown & Co., 1937, $3.50, Reviewed by Paul H. Buck.

I offer it in evidence as Defendant's Exhibit 11.

1790 The Master: It may be received.

* * * * *

Mr. Martineau: Q. You are thoroughly familiar with this review by Professor Buck, aren't you, Doctor?

A. Yes.

* * * * *

1796 Q. Then he says:

"The implications of Mr. Eisenschiml's research point strongly to a connection between the Radical Republicans with Secretary of War Edwin M. Stanton as their prime agent and the assassination plot."

You agree with that statement, don't you?

A. That is right, points strongly.

Q. Yes. Going on:

"The case against the Radicals and Stanton is developed under four major heads. (1) They wished to prolong the war so as to convert it from a struggle primarily to save the union into a war to emancipate the Negro. Successful in this they then desired to see Reconstruction
1797 proceed along vindictive rather than lenient lines of policy. (2) They developed an uncontrollable hatred against Lincoln, whom they could not dominate, who was lenient in policy, and who stood as the great barrier to their success. Lincoln must be removed. (3) The power-hungry Stanton was negligent, evasive, and double-dealing at the time of the assassination. (4) Stanton showed vagaries of conduct, deceit, and bias in the prosecution."

You agree with all that, don't you?

A. Yes.

* * * * *

1798 Q. "The evidence that Mr. Eisenschiml marshals is impressive under each heading. Especially in regard to Stanton does the case seem appalling in its completeness."

And interjecting a minute, here is Buck using this word "appalling" too, isn't he? Going on:

"Stanton's duplicity is established. So also is his thirst for personal power, and his restlessness under and hatred of Lincoln. Most serious of all, is the record of Stanton's conduct just before, during, and after the assassination which leaves no doubt that he was either grossly inefficient, criminally negligent, or positively involved in the conspiracy. Only by giving Stanton the benefit of every doubt could he be completely whitewashed. There are far too many doubts to permit anyone to believe that Stanton could escape unscathed on every count."

Do you agree with all that?

1799 A. Yes, that is a very fair statement I think. It gives all the possibilities and does allow a conclusion.

* * * * *

1801 Q. But I mean, is that a fair statement of the state of history before you wrote your book: that if all you are trying to establish is that Stanton hated Lincoln, that he was shockingly negligent in protecting Lincoln, that he was inefficient in the crisis, and acted queerly in the man hunt and prosecution of the conspirators, is that the—

A. I can't go along with that.

Q. In other words, you don't feel that the prior historians had—

A. Had never mentioned the protection, negligence in the protection of the President. I have never seen a statement to that effect one way or the other.

Q. So that when Buck says that if that is all you are trying to establish is that you are doing little more than establish more securely a conviction that historians have entertained for a number of years, there you part company with Mr. Buck, don't you?

1802 A. Yes, I do.

Q. Because you contend that no other historians had reached that conviction before you?

A. I don't think they expressed that conviction. I have never seen the statement made that he hated Lincoln. In fact, most historians go the other way.

Q. In other words, Professor Buck is in error here, then, is he?

A. No, or I am in error. We just differ.

* * * * *

1805 Q. Well, can we agree, then, that Buck was in your judgment an expert historian?

A. Oh, yes.

Q. An historical scholar?

A. Yes.

Mr. Gertz: He won the Pulitzer Prize.

Mr. Martineau: He did?

Mr. Gertz: Yes.

The Witness: Yes.

Mr. Martineau: Q. In other words, he got the impression that every one of your arguments was leading to suggesting that Stanton was a partner in this crime?

A. Yes, he had written to many history books and got enough chemistry.

1809 Q. Am I incorrect in assuming that that factual material which you claim you discovered is factual material pointing—evidence, that is, to say—pointing straight at Stanton?

A. Pointing, but I would not and I am sure you would not consider it evidence.

Q. But it is circumstantial evidence?

A. Circumstantial, yes.

Q. Circumstantial?

A. Circumstantial, yes.

Mr. Gertz: You mean not direct evidence?

The Witness: Not direct evidence.

Mr. Martineau: We draw a distinction there between circumstantial and direct, is that it?

A. Very much so.

1811 Q. Well, can we agree on this, do you think: that the evidence that you have presented here at some length against Mr. Millard is circumstantial in the same way as the evidence against Stanton?

A. I don't think so, I don't think it is a parallel case.

Q. Well, I mean we agree that you don't know of your own knowledge that Millard copied or pirated your book. Can't we agree on that?

A. I wish you would object to that question.

Mr. Gertz: I object to the whole series of questions. The questions are something to which I objected, but frankly, I am not objecting because not only do I think this does us no harm, but in many instances it helps us prove our case, so there is no point in it.

Mr. Martineau: Do you want to let him object to that one, then?

Mr. Gertz: He can take care of himself.

Mr. Martineau: Believe me, I am enjoying this. I am sure the doctor is, too.

The Witness: I have a great deal of respect 1812 and affection for Mr. Millard. I think he acted all the way through in good faith. He didn't know the law. He said so himself. He thought that what had appeared in print was allowable for everybody. You remember that testimony. I lay particular stress on that. I don't think he had any intention of stealing.

Mr. Martineau: Q. And then, of course, as we have all agreed, he gave you some mention anyway in his manuscript, didn't he?

Mr. Gertz: On a particular point.

Mr. Martineau: That is right, that is why I say some mention on that particular point. He mentioned the name of Otto Eisenschiml as being a great scholar of Lincoln's death.

The Witness: He acted like a gentleman all the way through, and I must say that the way he behaved in New York excited my additional respect.

Mr. Martineau: Q. And in the other book or piece that he wrote he certainly paid you the highest compliments, didn't he?

A. He almost overdid it, there, I would say.

Q. Well, he certainly was full of your praise in the research and knowledge on Lincoln's death, 1813 wasn't he?

A. Yes, and if you want to get really technical on this, and this has nothing whatsoever to do with Mr. Millard and nothing to do with Don, but if I suddenly find my watch in Don's pocket and I didn't see him take it, I still am allowed the conclusion that he took it from me.

Q. In other words, you feel that the evidence against Millard is circumstantial?

A. To that extent, yes.

Q. Yes, and therefore you respectfully submit and suggest that Millard pirated your book?

A. Yes.

Q. And is guilty of literary piracy, so to speak?

A. Well, the evidence is there.

Q. Well, I mean that is what you are submitting in this lawsuit, isn't it?

A. That is right.

Q. Now, can we agree that you offered the evidence against Stanton in your book in exactly the same way?

Mr. Gertz: Jack, I have been very patient, I have tried not to object, but you are so many million miles off
1814 that I think I ought to say this whole line of questioning is highly improper and has no materiality or relevance to the issues in the case.

. . . . . .

1818 Q. Is it fair to say, then, that in your writing you regarded Stanton as the villain of the piece? Let's put it, the hypothetical villain of the piece?

A. Yes.

Q. You offered him as Milton offered Satan, so to speak, is that right?

A. Yes, but history doesn't call for villains. This is not a stage drama.

. . . . . .

1824 Q. So this evidence, Doctor, can we agree that in writing the book then that you did edit the facts and so assemble the evidence?

A. Not edit; assemble.

Q. Assemble?

A. Yes.

Q. And you winnowed out some facts that you did not consider important?

A. Omitted.

Q. You sifted them out, you might say, though?

A. No pertinent facts.

1825 Q. You would decide what you thought was pertinent?

A. Yes, I did.

Q. We can leave Paul Angle with your statement that you don't quite agree with him when he suggests that you offered the implied suggestion that Stanton was in the conspiracy?

A. I don't agree to that. I offer no solution.

* * * * *

1835 Q. I won't belabor the point.

We can agree, to pass on, that your main thesis was as stated in Plaintiff's Exhibit 20a, that Booth was just a minor actor in the death of Lincoln, and that it was a result of a conspiracy in which high Washington officials were involved, possibly Secretary of War Stanton?

1836 A. Involved, yes. To what extent involved, that remains to be explained. I didn't explain it.

* * * * *

1837 Q. We will leave it with this:

You claim that Millard appropriated this thesis of yours, and thereby practically appropriated your books?

A. Yes. That is a substantial part of our claim.

Q. Can you point out in Millard's article where he appropriated that thesis of yours, that Stanton hated Lincoln, and that he and the Radicals stood to profit by his death?

A. I think the best way in which that has been expressed is by Dr. Riddle in his testimony when he said

that after reading Millard's article he got exactly the same impression that he had when he first read my book.

1838 Q. Well, that is what Dr. Riddle said?

A. Yes.

Q. Could you point out where Millard does appropriate that thesis of yours?

A. It goes all of the way through the article.

* * * * * *

1839 Mr. Martineau: Q. Point out where it appropriates your thesis.

A. From the article, reading on page 105, column one: "But as Lincoln sketched his humanitarian plans, he knew full well that some of the smiling, attentive faces before him masked hatred. To radical Republicans like the weasel-souled Stanton, every breath Lincoln drew was anathema. If he lived through these four new years of administration, every dream and scheme they had for raping the conquered South would be shattered."

Q. That is the only place, is it, where you contend that Millard appropriated your thesis?

A. That is the essence. From then on the rest is detailed.

Q. So that is the main sin, according to your way of thinking, Millard committed against you?

A. I wouldn't say that. I don't have the whole article right in my mind. Wherever Stanton appears in this article, I believe further evidence could be submitted.

* * * * * *

1840 The Witness: You know, Angle described it, much to my disgust, as a long footnote to the first book. As I think about it more calmly, I don't think he was so far off. It gives a lot of details for each chapter, and some new slants that I hadn't touched on at all.

You find a chapter on Stanton. You find a chapter on

Mrs. Surratt. You find one question which I deliber-
1841 ately left out of the first book, did or not Booth escape.

• • • • •

Q. Before you do, I will put this to you:

Isn't it true this is just a series of disjointed scholarly essays on various facets and curiosa concerning the assassination and the aftermath?

A. Curiosa in one chapter. The rest of it is very serious material.

• • • • •

Q. I didn't mean to be comical, believe me. What I meant was that each chapter in itself is a separate essay on some facet of the assassination and aftermath?

A. No. There are several chapters that hang
1842 very closely together.

• • • • •

1859 Q. Good.

Let me ask you this: When you wrote your book, you addressed a readership of scholars and serious Lincoln students, didn't you?

A. Yes.

Q. It is intended as a scholarly work and to add to the sum total of human knowledge?

A. Yes.

Q. That is the market that you addressed yourself to, isn't it?

A. Yes, that is the market that I had in mind.

• • • • •

1861 Q. Well, then, do you contend—and I am trying to shorten this up—I think I am summarizing what you have stated in Plaintiff's Exhibit 20a, and also taking the claimant's advances in the affidavit, I am trying to shorten it—do you contend, Doctor, that when the defend-

ant published this piece here in True Magazine, the one involved in this lawsuit, that that destroyed your market?

A. I really do not know for sure.

• • • • •

1862 Q. I just wanted to get your claim here, Doctor. Is it your claim, based on such information as you have at your disposal, that Millard's article did in effect destroy your market in the sense that I read from page 16 of Plaintiff's Exhibit 20a?

A. Yes, so far as I have been advised by my agent.

Q. In other words, this is something that you don't know of your own knowledge?

A. I do not know, no.

Q. Isn't it true, Doctor, that you have since learned that the market has been, was far from destroyed, or in any wise hampered by the publication of Millard's article?

A. I am aware of that, yes.

Q. In other words, this book by this fellow Bishop, "The Day Lincoln Was Shot," was just published a short time ago?

A. That is right.

• • • • •

1864 Q. Can we agree that Bishop's book is addressed to the same readership that you addressed your works?

A. That is right.

Q. And it is—

A. Not quite perhaps. This is more popular than my books would have been.

Q. But not as popular as Millard's article, can we agree on that?

A. That is true, yes.

Q. In other words, this has pretensions, at least, of being more of a scholarly type work like your work, isn't that so, more than Millard's does?

A. No. I think it is written for the popular taste.

Q. Whereas, you did not write for the popular taste?

A. No, I did not.

• • • • •

1865 A. I want to make this remark. In his weekly article in The Saturday Review of Literature, Ben Cerf mentions a letter which he received from the author of this book, Mr. Bishop, saying that "all those publishers who have refused my book as unsalable will now bite their teeth," fingernails, or something, something to that effect. From which it follows that the manuscript was refused many times by publishers who held the same opinion as those with which my agent was corresponding, and they all misjudged the public taste, and so did I naturally, being guided by the opinion of these publishers who refused mine.

1866 Q. Can we agree on this, that the publication of Millard's article certainly did not destroy the field of readership or the—

Mr. Gertz: The field of readership for Lincoln's books.

Mr. Martineau: The field of readership for this particular type of book.

Mr. Gertz: Dealing with the assassination.

Mr. Martineau: Q. Can we agree to that?

A. I am of the same opinion.

Q. It didn't destroy your field?

A. I don't think I can maintain that claim at the present time any more.

Q. Do you happen to know offhand, what is your information on the sale of this book of Bishop's, do you know?

A. It is usually estimated that—this is an alternate book for the Book Of The Month Club. It is estimated that the sale in that direction will be about a quarter of a million. You have more information on that.

• • • • •

1869 Q. Doctor, in either of your two books, do you
1870 have any fictional or imaginative conversation of the characters?

A. No, not once.

Q. That is a sort of quasi fiction-historical device that you do not use?

A. No serious historian would do that. Then he would write a noval. This is a sort of semi-novel.

Mr. Gertz: Bishop does have conversation.

Mr. Martineau: Q. And Millard does have, too.

A. They are perfectly at liberty to do that. They don't claim to write a scientific treatise.

Q. That takes it out of the field of scientific historical work and makes it sort of quasi-fictional?

A. Yes.

Q. And sensational, sort of?

A. Yes.

* * * * *

1877 ERNEST SAMUELS, called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Martineau.

* * * * *

1878 Q. Speaking of your law degree, Doctor, were you
1879 admitted to the Bar of Illinois?

A. Yes, in 1933.

Q. The Bar of any other state?

A. The Bar of Texas—it must have been 1928, to the best of my recollection.

Q. Are you presently a practicing lawyer?

A. No.

Q. You haven't practiced for some years?

A. No, I have done consulting work for my brother occasionally, but not in active practice. I have no office.

Q. Have you written any books, Doctor?

A. Yes, I have written two textbooks and a critical biography of Henry Adams. That, of course, is the more scholarly work. The textbooks were on Business English, 1936; and was published by Prentice Hall called "Business English Projects," and the work on Henry Adams was called "The Young Henry Adams," published by the Harvard Press in 1948.

Q. Was that your last work that you had published?

A. My last book length.

Q. I see.

A. Since then I have contributed reviews to a number of scholarly publications.

1880 Q. I see. Without going into detail what was the nature of those reviews?

A. Well, reviews of books on composition rhetoric, since I am a specialist in that field; reviews of works on the Adamses, Brooks Adams, Henry Adams as a historian; reviews of that character.

Q. Have you ever been appointed to membership in any historical society, Doctor?

A. Yes, I was inducted a corresponding member of the Massachusetts Historical Society last fall.

Q. Was that after your work on Henry Adams?

A. Yes, considerably after. It was a result of the fact that I have become a—was appointed a member of the Advisory Board for the publication of the Adams papers which you may have seen the announcements concerning it. All the papers are now to be published in one form or another.

Q. That is the work you still have to do?

A. Yes, I am—

Q. By the way, did you get any awards or anything for any of your work?

A. Yes, I received the Guggenheim Award. The announcement was made just about two weeks ago, to carry on work on the second volume of which the manu-
1881 script is, oh, about a third done, and I have all of my next year off. That is the Guggenheim Award, and then the university supplements that so that I have my full salary—

Q. You said the second volume. You mean of the Adams—

A. On Adams, yes, on Henry Adams.

Q. I see.

A. That will be the major phase and take it from 1877 to 1918.

• • • • •

Q. Doctor, have you become in your work familiar with the techniques and methodology proper to write a work of history?

A. I believe so. My work on Henry Adams, of course, required—since Henry Adams is noted as a historian—that I familiarize myself with his writings as historian and with historical theory, and particularly with the
1882 philosophy of history, and also preparations for it; it had to do with an enormous amount of reading as the bibliography of that book would show. Then, of course, I was professionally trained in the Graduate School at the University of Chicago in the various techniques of scholarship, and they are rather elaborate.

Q. Doctor, I forgot to ask you this: In connection with just literary works in general did you have any task which was more or less unpleasant in connection with students in regard to plagiarism or piracy or anything like that?

A. Well, yes, that was one of the painful tasks I had

as part of my work as Director of Freshman English. The Freshman English course is, of course, the largest course in the university.

Mr. Reuben: At Northwestern?

The Witness: At Northwestern, about twelve hundred students in some fifty-five sections, and I was Director of Freshman English for about four or five years. That required that I supervise the work of some thirty-three instructors, and also to serve as a kind of court of intermediate resort for the problems that arose in the classroom of plagiarism and copying, and by the time I
1883 was finished I had learned a great deal of the problems and had thought a good deal about the nature of the writing process and the nature of originality. And my decisions, since they might often have very serious consequences upon a student's career, had to be rather carefully weighed.

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A. Yes, if he made illegal, improper borrowing, and the question of propriety, of course, was often a very delicate one. If it was improper he would get an "F" for cause which would appear upon his record, and in exaggerated cases, especially when a student wouldn't come clean, he might be thrown out of college.

Q. You mean unless he confessed?

1884 A. Well, if when confronted with irrefutable proof and the irrefutable proof that I always preferred was to have a page of the student's theme and a page from, say, a book in which the two were verbatim copies. That I have always felt was conclusive.

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1887 Q. And what is that opinion?

A. That Millard's article or book length article, is essentially an independent work, an independent literary work.

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1888 Mr. Gertz: If you are going to refer to the notes in the course of your testimony may I suggest that the different notes be marked for identification?

The Witness: Yes.

Mr. Gertz: Sure.

The Witness: Now here, for example, I have an outline of testimony in which I tried to summarize what materials, or how I felt I could approach this problem.

Mr. Martineau: Do you want to have this marked?

Mr. Gertz: Yes.

Mr. Martineau: Mark this Defendant's Exhibit 1 of May 16.

(The document above referred to was marked Defendant's Exhibit 1 for identification, 5-16-55.)

Mr. Martineau: Do you want to mark some other notes?

The Witness: These notes are essentially some reading and analysis notes. Here are some notes that are typewritten.

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1890 The Witness: Now, I think you have asked me what basic principle I would apply when confronting a literary work. I should say that the expression "a literary work" is to be applied even though the literary work may not have high literary value because the same principles would govern whether you are dealing with, shall we say, Shakespeare or you are dealing with a popular contemporary novel. It is simply that there is a difference in excellence. That is, I don't want to argue, for example, that Millard's article is a work of fine literature.

Mr. Martineau: Q. We will concede that, I think.

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1893 The Witness: That is from a review by Edgar Allan Poe of Hawthorne's "Twice-Told Tales." That is perhaps his most famous critical statement.

Mr. Martineau: Q. Is that in some magazine?

A. That appeared in Graham's magazine in May, 1842, and it is a principle that has been—you will find it in literary criticisms ever since.

If I may quote one more sentence that I think has a bearing on how I approached both Millard's article and Mr. Eisenschiml's book I would like to read it:

> "If his very initial sentence tend not to outbringing of this effect, the single unique effect, then he has failed in his first step. In the whole composition there should be no word written of which the tendency direct or indirect is not to be the one pre-established design."

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1894 The Witness: What Poe there was writing about was a short story, and I think it is very relevant in considering Millard's article, because descending from Poe has been a whole genre of mystery and horror and fantasy stories, and True magazine, like other magazines, have exploited it.

Well, first, if I may say, first was the fictional development of the horror and the fantasy story. Then in our own time, with the rise of the interest in the article, there has been a shift of this singleness of effect and of the effects that were the special success of Poe, that is, horror and mystery, to the factual story, and hence you have magazines, as I see it, as True Confessions, True magazine, and many others which use experience, factual and realistic experience, as the raw material for producing the effects that are aimed at in fiction.

And I feel that that principle—I see it distinctly at work in Millard's article, that the effect that he has aimed at is not the effect of history or of scholarship, the 1895 sort of effect that is aimed at in Mr. Eisenschiml's historical and scholarly works, but is the effect to titillate the feelings of the reader, to excite him, and hence

although you have the appearance of historical fact, that is not of the essence of the literary effect that the writing is aimed at.

It is only in that by applying those principles and that principle with respect to Poe that the reading, I think, of Millard's article becomes wholly intelligible, and that is that you have a mixture of fact and fiction, a mixture of fact and fictional devices which makes the thing as a whole completely different from, as I say, the scholarly work in its main trend.

Mr. Martineau: Q. Can I interrupt you right there, Doctor?

A. Yes.

Q. As you develop this subject you are going to give instances of that principle that you stated?

A. Yes, that is, the kind of fictional and narrative patterns which the writer's purpose has imposed upon his materials in True magazine and how they differ from the pattern which Dr. Eisenschiml's plan imposed upon 1896 his handling of his materials as a scholar and historian.

Q. Would it be in point right at this juncture to ask you what, in your opinion, is the plan of Millard's work?

A. Yes.

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A. Now, what I would like to suggest is that there are two ways of approaching Millard's work to get at its character. One, I have suggested is the internal, shall we say, the internal necessities of what the writer is up to, what the editors and the character of the magazine have imposed. There is a certain effect, a certain kind of audience that you are trying to reach to give a particular kind of thrill, and if you leaf through the magazine you can see the nature of that. In one way it is determined by the audience.

Who reads True magazine, for example? Well, I found it rather interesting to deduce the readership from, 1897 for one thing, the advertising, the flamboyant advertisements of whiskey, of skin bracers, of tobacco, of cars, of firearms, of patent medicines, and so on. I think I remarked to someone the only thing missing is allusion to contraceptives.

Q. Are any aphrodisiacs in it? I didn't notice.

A. I was—I don't think so, although there are advertisements for art classes which I have always felt are very revealing in certain types of magazines.

In short, I felt that anyone who wrote for True magazine knew where he was going, or if he didn't the editor would fix things up so that it would reach this he-man and red-blooded American audience who want the excitement, and hence the excitement of, certainly, Lincoln's assassination would be a natural, like mountain climbing, all acts of violence.

What is clear, it seems to me, is that there would be no place in such a magazine for a work of scholarship, for footnotes and I ought to add parenthetically, that after becoming interested in this problem I noticed, or I recall that in the magazines of general circulation footnotes are obsolete, there is no expectation that they will be foot- noted; that here you have, obviously, a magazine, a 1898 publication of general circulation, not going to people who are interested in scholarship, but interested in a peculiar kind, a special kind of entertainment for which they have paid.

Now, True magazine is called "True," but if you look at the highly colored illustrations you can see how true it is. For example, this color illustration of this magazine showing Booth leaping out of the box—that is a fictitional reconstruction of a scene and a highly imaginative one.

Now, with that object, to-wit, that the writer shall jazz

up his article, give it a sense of drama, give the illusion of reality, give it in fact a basis in fact but at the same time all the excitement that you would get in fiction, then we can see what takes place.

What are the things that Poe, for example, would suggest: The macabre, the irrational, the portentous, the ominous, all of those things that appeal, well, to basic love, shall we say, of superstition. There is a complex in this story, a tone which is set at the very beginning, and I have made an analysis going through in which I have looked for these things which have determined the
1899 tone of Millard's article, and it is rather astonishing once you begin, having caught the clue from the opening when he speaks of "the maddest"—what is it—"murder," "America's Greatest Unsolved Murder"; from the very beginning, the air of mystery, of bafflement, of confusion, of chaos is struck, and that is maintained to the very end.

Page after page and column after column, for example, you will find those key words like "chaos" and "confusion," in which he strikes that gong upon the reader.

In short, it became quite clear to me that Millard was not interested in establishing a fact, in answering any questions, but, rather, that he was relishing asking the questions, heightening the mystery, and that if a man wanted the answers to the questions and to the mystery he would have to go to Dr. Eisenschiml's works where an effort is made to give the answers or show the direction in which the answers would take.

Q. Is there any element of ill omen, and superstition and that sort of thing that you picked out of Millard's work?

A. Yes, it is filled with it.

1900 Q. Forebodings of fate and all that sort of thing?

A. Let me show you. In that story pattern notice

the tone. Even the research he refers to: "The research is fevered and fanatical. There is an air of fever about everything associated with the Lincoln case."

He speaks of the strange paradox at the very opening that the more we know about the case the less we know, which is a very fine way of piquing the curiosity of the reader.

At another point he speaks of every time you come upon a mystery the mystery paradoxically uncovers an even deeper mystery, and he always leaves it at that deeper mystery.

Then there are these literary touches: Notice that Lincoln is assassinated on the same day of the Passion of Jesus, it is Good Friday, and that is stated at the beginning, and then about midway he recurs to Good Friday. The parallels are a little bit blasphemous to the crucifixion. There is the rain that by a magical coincidence falls that day; the atmosphere of the day corresponds to the event.

In short he is using here a well known literary de-
1901 vice of the pathetic fallacy—as a matter of fact, it seems to me there are distinct echoes of Julius Caesar. The likeness is inevitable. I think Crook hears, and for this I believe—I am told there is no historical basis—Crook hears Lincoln moaning in his sleep, and as soon as I read that I knew that Millard, or unconsciously—and an author frequently will do things, drawing upon his unconscious literary memories, and if you will recall when Caesar—before Caesar was to be assassinated Calpurnia moaned in her sleep. It is, as a matter of fact, one of the great myths that whenever a great man is to die the heavens know of it. As a matter of fact, when that struck me I decided to look it up and the phrase, I think is pertinent. Calpurnia says, "When beggars die there are no comets seen. The heavens themselves blaze forth the death of princes."

And it is that theme that runs through, Lincoln himself having his premonitions; there are scenes and portents.

I said I was going to illustrate them.

Crook speaks of the crying; there is the pre-knowledge which I think accompanies every great assassination,
1962 the pre-knowledge of the crime that is to take place; Booth's maniacal and insane laugh, the reasonless laugh is also one of these strange indications.

Then at one point he speaks and says there are three ominous portents of the coming catastrophe, on page 104 of the True article, and he regards these as omens, that is; Millard is obviously playing this up, playing the superstitious element up: The lock of door 8 was smashed and would not latch; there was a "pale glow of raw wood"—I like that literary touch—"where a peephole had been bored"; and "a hole had been chopped in the wall behind the corridor door * * * so that a 2 x 4 could be wedged." That sort of thing is stressed. Wherever he can wring from it some sort of supernatural inference you will find it throughout the story.

Then there are patterns. For example, he has gathered together rather ingeniously, I thought, the fact that each of the principals—I have forgotten now about Booth, but each of the principals, Lincoln and Grant and Lafayette Baker and another one, four that I have noted, act out of character; they act out of character; that is, there is a pattern.

1963 Now, why do they act out of character? Well, we see, ultimately, that what he is driving at is that fate—fate is at the bottom, that all these irrational acts that he has gathered together from many sources, it seemed to me, of illustration of mystery and irrationality—and the only explanation he really offers is that it is fate that brings them together, and so the omens of evil at the beginning are fulfilled at the end when he tells how many people went insane and all the superstitious consequences.

Well, he has Lincoln doing an uncharacteristic act wholly unexpected; he has Grant doing an uncharacteristic act. I think that was the one when he decided not to attend the theatre; he has Baker doing an uncharacteristic act, wholly unexpected. Instead of being in on the kill, the capture of Booth, he sends Luther Baker.

Well, how do you account for this? Only that some malign and evil fate was at work. Well, now, I think it would be appropriate to this point to suggest why I was so tremendously struck by the difference between the two works. When you turn to Dr. Eisenschiml's work fate is not at work there, but, rather, a working hypothesis 1904 is developed, and it seems to me rather well supported that there is a plan behind all this seeming planlessness, behind all this seeming chaos, and that line begins at the beginning and runs through the end plausibly: that Stanton and the Radicals master-minded the whole business, so that the contrast is very striking. Here you have irrationality accounted for by fate, and here you have all the events accounted for by this giant, planned conspiracy.

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1905 Q. To parallels?

A. To parallels. At the very beginning of literary study one of the earliest and most interesting questions is, what is a writer's indebtedness to other writers? It is obvious that no man writes in a vacuum as T. S. Eliot in "Tradition and the Individual Talent" has pointed out very ably, "Each work is an accretion to the whole body of literary tradition," so that the first training I think one undergoes is what is the source of ideas?

You are always interested in to what extent is the author completely original, to what extent does he stand on the shoulders of his predecessors and source hunting then becomes the happy hunting ground of the student.

However, the great danger, and as a director of graduate study I constantly have to remind my students
1906 the great danger of source hunting and of parallel hunting is that in your ignorance of the total mass of material you will attribute only one source to a fact or to a quotation. You can check that, by the way. Some of the most favored quotations that you will find in a book of quotations are the quotations that have occurred several times. Sometimes it would appear as an independent creation.

At any rate, the greatest fallacy is this conception of the single source. Actually, one frequently finds that the source of an idea or of a passage may be a common source. Sometimes, and this is often very puzzling for the student to see, the source may be in the fact that two writers or three are dealing with the same circumstances like a reporter who goes, or two reporters going to the scene of the crime. What they will write about, even the order, and usually the chronological order in any historical account will be the natural one—what they will write about and what they will say are bound to be similar, and often since we are using a common language and a common body of idiom will frequently be suspiciously identical because the historical event dictates the treatment, so that if
1907 you were to write about the Crucifixion as Matthew and Mark and Luke and John wrote from a common tradition you have the same event, and there are strong similarities and also very great dissimilarities.

Every great event, the assassination of Julius Caesar, the assassination of Lincoln—of course, a tremendous amount has been written about every aspect of his life; I am no Lincoln authority, but I have looked at it sufficiently to see that the shelves are loaded with accounts, particularly this interest of course; the most dramatic is his taking off, or the assassination, and hence in dealing with the parallels one has to apply that principle.

Now, there are other dangers. I have suggested that the relation of these parts, that is, the individual parts of Millard's work and the individual parts of Dr. Eisenschiml's work, the relation of isolated passages, that is, putting them together, and what struck me as soon as I looked at the affidavit is that there is a superficial and convincing closeness, and I confess that when I first looked at them I thought how amazing the closeness because at the moment—

Q. Pardon the interruption. You mean the affi-1908 davit of Dr. Eisenschiml in support of the motion for summary judgment?

A. Yes. Yes.

Q. I am sorry to interrupt you.

A. Until one discovers that they are brought together out of the context which gives them their total significance, and that they form only a very small part of either work, that is, in the case of Dr. Eisenschiml there are two very large works; in the case of Millard there is an article that runs, I suppose, around twenty thousand words so that—or is it more?

Mr. Reuben: I think it is forty.

The Witness: Or perhaps it is forty. I have forgotten that point.

Mr. Martineau: Q. Whatever it is is in the record, I believe.

A. Yes. And hence when I would make the comparisons I had the parallels before me, and what struck me as I read and re-read was how misleading these parallels were and how once again I was reminded of what is a basic literary principle.

I turned to a book that scholars use a great deal in which the dangers of the use of parallels in determining originality is pointed out, and I should like to refer to 1909 that, and that is a book published in 1949 by Wellek,

Rene Wellek, and Austin Warren, called "The Theory of Literature," and that is at the present time the most authoritative work in the field of literary criticism and of literary scholarship, and he there points out that the scholar, when he confronts two works and sees some superficial resemblance between the parts, that he must, if he is at all careful, be reasonably certain that they cannot be explained by a common source.

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1913 And hence it was that canon that I kept before me, and although it was clear that this was not an original piece of research, that he was using pieces like a mosaic from various sources, from Dr. Eisenschiml, from Carl Sandburg, from Pitman, and obviously others,
1914 that these were transformed by this narrative plan of his to fit the particular purpose for which he was writing that made it one sort of thing which was quite different from what is obviously a remarkable piece of historical scholarship, and that is Dr. Eisenschiml's work, "Why Was Lincoln Murdered?" and "In the Shadow."

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1915 Mr. Martineau: Q. Do you want to go on, Doctor?
A. Yes, I think that I can now turn to Dr. Eisenschiml's work applying these principles to get at what is the nature of that work, and it seems to me that especially—well, both books, but the book that is most relevant since it covers the same event, the same transaction, is "Why Was Lincoln Murdered?", although it became clear to me in reading and re-reading that "Why Was
1916 Lincoln Murdered?" covers much more than the transaction of Lincoln's assassination.

That book is a work of historical scholarship, and its character is shown, obviously, in its physical aspects from the preface to the index. It has the whole scholarly apparatus of footnotes, and Dr Eisenschiml is scrupulous

as a scholar should be in acknowledging his sources. He tends to quote at length from his sources when he is documenting a fact, and documentation is one of the dominant characteristics, I would say, of that work. Sometimes one may feel that the documentation is tedious because since he does not have, shall we say, the liberty of a fictional writer, he cannot doctor it, what he is trying to do is to prove something, he has to give what he states in extenso, and that is, I felt, a characteristic of giving the reader the material upon which he has based his conclusion or his inference or his implication.

Q. It is like a lawyer writing a brief. He has to stick to the record.

A. Yes, and often, as the saying goes, he is stuck with the record, and it is impressive how skillfully the author does work with the material, sometimes when I felt that they were not profitable.

1917 Q. When you say the author, you mean Dr. Eisenschiml?

A. Dr. Eisenschiml, yes.

Well, I would like to suggest, applying what I have done at Millard's work and ask the question, what audience does such a book try to reach?

Q. Dr. Eisenschiml's book?

A. Dr. Eisenschiml's. An audience that will read a scholarly work. It is a work that will be reviewed by historical critics, as it was very widely. I cannot imagine that it would have a wide popular sale, certainly not "The Shadow" because it is a scholarly work, it is a contribution to knowledge and a contribution to learning, and if there are any flaws in it they will be pointed out by other scholars and certainly he will be taken to task by critics. As a scholar, making a contribution to learning, it seems to me he is like any other scholar throwing into the common stock of knowledge what he has discovered, and that

thereafter these facts, these ideas, these inferences are used, popularized, they are abused, frequently, but that is no more than, it seems to me, a scholar or historian expects of his work.

1918 The characteristic of such a scholarly work, and certainly marked in Dr. Eisenschiml's books, is that he will write with perspicuity, clearness, of resolving every question, of carrying it to its logical conclusion or until he comes up against a blank wall where the evidence —where no more evidence exists.

Now, in looking th[illegible]at what is the nature of the work, this historical work, it is complemented to not one transaction, but a transaction and its sequelae, what follows, that is, the assassination of Lincoln as it plays a part in larger historical circumstance.

In short, "Why Was Lincoln Murdered?" has a scholarly thesis, and it is a thesis that, it is clear, had to be adopted before the book was written, that is, the thing had to be thought through.

Where does this trend, and the thesis of that work is that Lincoln's assassination has never been adequately explained, and the evidence, especially including the new evidence, that he dug up would lead a person to adopt a working hypothesis that Stanton and the Radical clique were responsible in some way not yet fully deter-
1919 mined for the assassination of Lincoln.

Now, it is that central theme, the historical theme, that governs the marshaling of all of the evidence in the book, as I see it. I believe in the first ten pages Stanton is named about eleven times, that is, Stanton, like Milton's Satan, is the villain of the piece. As I say, I think I mentioned earlier there is a disclaimer. Perhaps Dr. Eisenschiml would not as strongly urge his thesis today as he did, was it, eighteen years ago, but it is that his-

torical theory that he adopts as a working hypothesis that Stanton lay behind all these occurrences, and that Stanton and his accomplices—I think one may call them, and that is what makes it possible to explain the assassination of Lincoln, that this is a hypothesis, I believe the word is used—it is not an indictment—that could be supported in any court of law, but the implication was plain to me as it, I think, has been plain to other critics, that in the everlasting court of posterity Stanton is put to it to defend himself, that there is a prima facie case of his guilt.

Now, one can go through—I have some notes—in a similar way to show that development.

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1920 The Witness: The object of the book, as I have noted down here, and I think it is expressed, the object is to correct history, that earlier historians have been in error and every chapter beats on that very significant revision, and you have, then, a pattern of demonstration, the errors of history either corrected or the way pointed to the possibility in which they can be corrected.

He points out that the problem is a very difficult one, that the only outward evidences of a conspiracy that was afloat against the life of the President were only

1921 two acts, and that was Atzerodt's signing of the hotel register and Booth's leaving his card at the same hotel, if I read that introductory section correctly, but what follows, and constitutes the principal part of the work is the inward and inferential evidence of the conspiracy.

And so each chapter, and I have jotted down what seemed to me to be the gist and the drift of each chapter, is with respect to that thesis, that working hypothesis, that Stanton and his crew were behind the conspiracy.

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1932 And viewing, then, the two works I think it amply supports my judgment that these two works are different in their character, completely different in their character, their direction, the audience that they seek to reach, and on the question of originality that Mill-
1933 ard's work is importantly an original work, just as in its scholarly way and historical way Dr. Eisenschiml's work is importantly an original work, because the thesis which integrates this mass of material that he has acknowledged, using much from other scholars, has been drawn together into this pattern of very significant demonstration, so that these marks are stepped forward, as I see it, in Lincoln's scholarship.

Mr. Gertz: Of course, I move the whole statement by the witness be stricken.

Mr. Martineau: That is understood.

Q. Doctor, who would you say was the hero of Millard's work, hero or villian, sometimes it is diffcult to distingish.

A. Well, it is obviously Booth, and he devotes—I meant to call attention that he devotes a good deal of attention to Booth as the dramatic person, his habits and the devotion that was accorded him, the help that was given to him, so it becomes a kind of cops and robbers story. Those who are trying to capture him and those who are trying to help him to escape, that is, toward the end the southerners are helping this popular hero to
1934 escape, so that the center of the story there, the dramatic interest, is obviously Booth.

Q. Did you gather from Millard's work, Doctor, that he was hinting or insinuating that Booth was just a tool of Stanton in this clique, in this assassination?

A. No. It is not a perfect piece of work, and I understand that the published article is substantially reduced

from the whole manuscript so that there are fragments, I think and one there is one allusion, I believe, to Stanton which does not materially affect the whole drift, but what he is stressing there is, no one knows, and the overtone of fate, and there may have been—there may have been forces I believe in the manuscript he refers to the dark star which is a good illustration of the difference in which he implies that there is a fate and a fatality to the story.

1935 Q. I was just wondering if you had drawn off any instances of pure fictional devices employed by Millard like that one you just mentioned?

A. Well, there are a number of things that struck me that I think show very strikingly the difference between the two works, and that is in a scholarly work the literary art is suppressed. Of course, he escapes, and very often in Dr. Eisenschiml's work it is quite clear that a literary man is at work, but he is working under wraps, the documents restrict him, whereas with Millard he takes a dramatic moment, Abraham Lincoln and his wife, and so the dialog is given as a writer of fiction would give it.

He has the verbs, for example, "Mary whimpers," 1936 "Lincoln soothes her," and you have reproduced as in a fictionalized biography the conversation.

Now, I believe there are sources for it, but they are rather skillfully put in, so we have the story moving as a story without any extraneous elements.

Oh, yes, and then there are a number of things about the Millard article that ought to be stressed. It is narrative technique in which it differs from what is available to the scholar. It runs very much like a movie or like Shakespeare's Anthony and Cleopatra. It uses a cinematic technique of advancing simultaneously various elements of your story. That is, first we will take up Lincoln, let us say, and his wife. Then what was Grant doing;

then what was Booth doing? And the whole thing then is made dramatically parallel, so that the action moves stage by stage like a cross-section of a drama, and it is that way in which the action is conceived so that he can use dramatic suspense, dramatic preparation, so that the reader will have a hint of what is coming. These are devices of the writer.

And then, of course, there are colorful touches that I doubt there is any historical justification for. I
1937 think he has someone standing in his long drawers or in his underwear—

Q. Stanton, I believe.

A. Stanton, I think, and he has indulged his fancy—well, I got the impression he was indulging his fancy in a number of places. As a matter of fact, the affidavit, Dr. Eisenschiml's affidavit, very justly points out the liberties he takes with the facts, or that he says something is not determined or cannot be known. Obviously, for his purpose he doesn't much care, and so occasionally he exaggerates the mystery of a thing when, obviously, there is not that much mystery. What he is hunting for is that which is mysterious or occult, and so on, and the style also is picturesque.

I ought to illustrate that, but the language itself, it seems to me, at almost any point, particularly when he describes Booth—oh, yes, I ought to interject, I spoke of patterns, patterns that a fictional writer will use. The Good Friday is one, a kind of mythological pattern, but he also—one of the most striking ones was Booth's leaping from the box and having his heel caught in the flag, and Millard points out that it is the United States Flag, that it was brought there for a special occasion, and that the portrait of Washington was there, and it is just that position, it seems to me, and the point is quite clear. Here was this Southerner who has just committed an

offense against the Saint of the North, and how is his plot frustrated but by the Flag itself, that is, the Flag is given a kind of fetish power, and that seemed to me to fit in very well, and then the nice touch of having George Washington's—point out George Washington's portrait was there, because a man who is dying above George Washington's portrait is a man who is forever to be linked with George Washington as the great president, Washington and Lincoln, and it seems to me that Millard again and again in that way puts together his materials so as to get that maximum effect, and that effect is what he is aiming at.

And so I have already pointed out that it is these differences, the differences in character and the effect of the article, the emotional effect that is aimed at, the entertainment, against the intellectual conviction which Dr. Eisenschiml's work aims at, the differences in structure and
1939 organization which I have pointed out, the differences in emphasis and in the scope of the entire story, the differences in the standard of accuracy, of documentation, and so on, that makes it clear that each work has its separate character and that Millard's work is by any fair reading of the piece an original work.

Q. You did examine those parallels too, didn't you, the common sources?

A. Yes, I did.

Q. Do you have anything to say about those?

A. Yes, I—well, the first thing that struck me, there is obviously no copying of language except, I think, I detected ten words that looked like direct copying, though they might well be verbal echoes.

The question is, what are the possibilities? Where a man has obviously access, he is interested in the subject, and submerged in his materials, and I believe consulted

with Dr. Eisenschiml, so that, as I say, I can see no parallels in language, no copying.

Now, as to the common sources, it becomes clear from what I have looked at that these parallels are ones that would necessarily appear from any man who is famil-
1940 iar with the literature, that he has used materials, obviously, that Dr. Eisenschiml has used, and I take it that he has used materials, later materials that appeared after Dr. Eisenschiml's work, like Bryan's book and "Myths After Lincoln."

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1942 Mr. Martineau: Your Honor, Defendant's Exhibit 4 of this date is the document we have just been talking about. I have just had it marked, and it is the drawing together under one cover of the source material which we referred to at our last hearing. You will remember I started to read some of the books in evidence, and just for convenience sake we put these together and I furnished Mr. Gertz and your Honor with one, so we can all find these works without handling all these great big books, and it is only in that sense that I offer it as an exhibit.

In other words, it should be sixty exhibits, I suppose. Mr. Gertz objected to it.

Mr. Gertz: And I have an objection to the exhibit, but I would just as soon not argue them now.

The Master: All right, subject to the objection.

Mr. Martineau: Q. I guess you were referring to this?

A. Yes. This is the sort of research that would need to be done when you are working out a scholarly problem. Is there a unique source or is there a common source.

Q. You mean between Millard and Dr. Eisenschiml?

A. Between Millard and Dr. Eisenschiml. That is,
1943 the fact that Dr. Eisenschiml's work was published before Millard's is no proof of any borrowing.

Q. By Millard?

A. By Millard, since the most important—the most important refutation in such an inquiry is the common source, and hence in going through this it supported what was basically an impression that there were common sources. As a matter of fact, there is an indication within the article itself. One would wish—as a scholar I would wish—that all people who borrowed would give one credit since the rewards of scholarship are generally rather meager, but it is an almost universal practice now, and I think certainly among scholars generally it is regarded as a fair use to use the material so long as it is not substantially copied, and in looking over these notations I was struck again and again by the fact that these adequately accounted for what at first blush, when I was looking at the affidavit, seemed like borrowing.

Q. In other words, the impression you get after looking at this Exhibit 4 or the excerpts contained therein is that if Millard borrowed he borrowed from the common source?

A. That is true. That is true.

1944 Q. Or may have?

A. I am not—it would appear from the acknowledgments that have been made he borrowed from Dr. Eisenschiml, but that Dr. Eisenschiml was one of, obviously, many sources; that Millard was certainly familiar with the principal works.

Q. Let me put this to you, Doctor, while we are right on that subject. Millard, of course, gave his deposition and admitted that he did consult Dr. Eisenschiml. I believe he said that anybody who didn't in dealing with a problem of Lincoln's assassination would not be doing good research. He also said that he consulted wherever possible all the original sources. Now, taking those facts would it be your opinion that Millard would more

easily, or would tend, I should say, to take it from Eisenschiml only instead of going back to the original sources because of the inherent laziness of human nature, which is what I believe Dr. Riddle said?

A. Well, that would be—it depends on how interested in Lincoln material, Lincoln work, Mr. Millard was, and there is every indication that he, if I may use the word, is a Lincoln bug, and I would think, from the indication, 1945 if anyone were to ask, I would think that he is more indebted probably to Sandburg and Lloyd Lewis than to anyone else, which is the impression I got, partly because Sandburg's style, I think, lends itself, as he actually makes the quotation—there is a picturesque and literary poetic quality that would be more congenial. Dr. Eisenschiml's materials are sometimes rather refractory, and you have to work on them to adapt them to the particular purposes of the magazine.

* * * * *

Q. Doctor, you mentioned a little while ago, as you read over this material, there were a couple of instances where you thought Millard had copied. Can you lay your hands on those so his Honor can get your opinion on those?

A. There were two—I should have made a note 1946 of that, but in the affidavit, while going through here I was astonished by what was said in paragraph 19 in which it was suggested that there was copying, plagiarizing, infringing and pirating of these facts, because in all my experience in literary work it seemed to me that when facts or ideas are contributed by a scholar then they may be used so long as they are not used in the manner that the man who dug them up, using the literary style or the organization, so that there is an improper use of someone else's effort.

Q. Di you find any evidences which would lead you to the opinion that Millard imitated Dr. Eisenschiml's organization?

A. No, except in so far as the chronological scheme is principally followed by both.

Q. Well, both were limited then, by the dictates of history?

A. Yes. It is the very unusual writer who will try any other scheme. It is pretty dangerous. You lose your reader. There is a use by Millard of flashbacks which have their dramatic value.

Q. Do you find that in Eisenschiml in any instances?

A. I don't recall, certainly not as a literary
1947 device. Only as necessary to the development of the argument, but as a systematic device I am quite sure it is not used.

* * * * *

Mr. Martineau: Q. As you go through that and you pick them out you might refer to it by parallel number, then we will know.

A. Well, it is hard, and this again illustrates the difficulties of parallels: "And afterwards Stanton swore under oath"—then the suspended dots which indicate an omission—"that Abraham Lincoln had not been" * * * then "Stanton * * * testified under oath that Lincoln did not visit."

Without getting your context you can't see the true relation because there might be a great deal intervening or perhaps very little.

Q. What parallel was that, Doctor, do you remember?

A. That was No. 10.

There are similarities of language but not identities.

Well, here: "In his memoirs"—that is the con-
1948 struction of the sentence—"Grant skillfully slid over"; "Grant passed over." That is No. 4.

Q. Parallel 4?

A. Yes, parallel 4. Well, the parallel there of a phrase is very limited, and the question would be, was the book open or, since that is a rather natural form of expression, did that occur to him in handling the material, and it seems to me that it is impossible, that the writer himself could hardly know whether he was recalling or whether that was the natural form of expression, but it is that sort of thing, and that is the only sort of copying that I saw, that is fractions of a sentence, but I nowhere saw any extended copied passage.

There is similarity of circumstances, but, as I say, they are dealing with the same events, and roughly in chronological order.

Q. Would the material which you did see be the type of material which would cause you to give one of your students that "F" mark for bad morals?

A. No. No, I would be very pleased if a student did as much research and made such an effort to put into his own words and to put in an independent artistic structure such complex materials so as to get such an extraor-
1949 dinarily different effect.

Q. As Millard got from Eisenschiml?

A. As Millard did, yes. There are two totally different impressions, two totally different effects from, as I say, essentially or a part of the same circumstances, because, after all, the circumstance is rather limited. There may be ten thousand facts, so to speak, and all men who work with them have that to work with.

Q. In other words, both are to some extent bound by the facts of history, are they?

A. Well, yes. Shakespeare used Plutarch, and Plutarch's account of Cleopatra, but Plutarch had another account; there is a remarkable difference in the end result.

Q. Do you find any fictional exaggerating in Millard's

work or heightening, any of that sort of thing? Can you tell his Honor a few instances of that?

A. Well, of course, the basic one is the exaggerated emphasis given to the occult and to the portentous because unless you are really superstitious you would have to dismiss that as simply the imaginings of a writer, again and again, to give these portents.

1950 Then another example of the heightened is the way he juxtaposes his use of dramatic irony. Here is the celebration for Grant; the town is joyful; and yet, ironically, we know that a great tragedy is in the making. And Millard makes the most of that and gives you a note of tragic foreboding.

The style that I quoted much earlier on the wood, the glow like wood, the gimlet hole, is the sort of license that I doubt whether a historian would allow himself; and then, of course, his stress on coincidence. Again it is the occult. You will remember the dream, and then the fulfillment that Lincoln's body then was brought back to the White House in fulfillment of his dream. His description of Lincoln's reaction when Stanton entered, "Lincoln seemed to freeze," and he plays up a kind of fetish, that is, the fact that Stanton hated Lincoln has a kind of effect upon Lincoln in a way you are made to feel contributed to Lincoln's death, as an old fetish idea. If you hate a man enough you can hate him into disease or death.

Q. You mean that is Millard you are speaking of?

1951 A. That is Millard, yes.

Q. You referred to this part in Millard where he speaks of the weasel-souled Stanton, this on page 105: "But as Lincoln sketched his humanitarian plans he knew full well that some of the smiling, attentive faces before him masked hatred. To Radical Republicans like the weasel-souled Stanton, every breath Lincoln drew was anathema."

A. Yes, that is going beyond the materials.

Q. In other words, that is not strictly historical writing?

A. No. We have illustration to blame for that kind of biographical sketching, that is, where you imagine yourself in the mind of a man and there is no evidence at all to base it on; it is all a poetic kind of inference.

Q. In other words, that is quite an unhistorical scholarly approach, isn't it?

A. Yes.

Q. Unscholarly historical approach, I got mixed up.

A. I would say so.

Q. Because there is no evidence that that is what he did think, is that it?

1952 A. Occasionally historical research—because I have been guilty myself of being tempted to make some inference, but I have realized that I was departing from my job as a scholar, and you do open yourself to criticism from other scholars that you are going beyond the evidence.

Q. Doctor, in your opinion just a question or two about the readership—in your opinion would you say that Millard's work removed the heart or substance from Dr. Eisenschiml's work and thus would tend to interfere with the future republication of Dr. Eisenschiml's work "Why Was Lincoln Murdered?" or, "In the Shadow of Lincoln's Death"?

A. No, I would. I think I could say categorically, no, it would not. I can't imagine the serious reader encountering "True" except in a dentist's office, and if a serious reader did, as I encountered it, I think then, if I had curiosity, I would want to go to works such as Dr. Eisenschiml's or Bryan to find out, well, what is the truth, what do we know. Certainly I wouldn't go to True magazine

for the truth no more than I would go to True Confessions for the truth.

Q. Then would I be stating it fairly if I asked
1953 you whether or not if a true scholar, a real scholar, did happen to pick up True in a dentist's office and read it, that far from killing the sale of Dr. Eisenschiml's works it might stimulate him to go and read him, even though Dr. Eisenschiml is not mentioned? Is that right?

A. Well, if he didn't know of Dr. Eisenschiml and he was a scholar he would certainly want to look up, as I did out of something more than curiosity, and found that there is an astonishing amount in the bibliography. Monaghan's Bibliography of some years ago contains three thousand items. I was astonished to see how much has been written about Lincoln and on the assassination. One might guess there are forty or fifty treatments of the assassination itself. It is a constantly fascinating subject by scholars, putting aside heaven knows—well, here is the sort of thing: The Chicago Sun-Times on February 12 had a story on Lincoln's death, and I am sure that must occur every February 12th, some popular account, and the writer, the hack writers would never bother to give their sources.

Q. Hack writers, did you say?

A. The hack writers. They do it as a profession
1954 and try to make a living. Scholars commonly make a living teaching or in some other way. It is the unusual scholar, I think, whose book somehow is picked up and becomes widely read, widely sold.

Q. I forgot to ask you before testifying in this case you had known the doctor, had you not? Had you met him before?

A. Yes, I had a very pleasant meeting with him some years ago in a talk before the Civil War Round Table, a very agreeable meeting, and gave a talk on the Adams family and the reconstruction problem.

Q. You mean you gave the talk?

A. Yes, I gave the talk.

Q. Did you meet Mr. Gertz at that time, too, or did you know him before?

A. I have forgotten whether Mr. Gertz—I have known Mr. Gertz for many years, known him and admired him, and admired Dr. Eisenschiml. I find my appearance here has its touch of embarrassment, but as I say, I have a professional responsibility, and was called on, and in a way it was a challenge to my professional training since I had been particularly interested in literary criticism at the University of Chicago when I did my doctorate 1955 there, and one of the foremost critics in the country, Ronald Salmon Crane, trained me, and I owe a great deal to him, and I felt that this was the sort of problem that ought to test the validity of this training and carry it out of the classroom and into the greater world and perhaps may be of help.

1959 *Cross Examination by Mr. Gertz.*

Mr. Gertz: Q. Doctor, did I understand you to state that you are testifying here at the request of the head of your English Department at Northwestern University in Evanston?

A. No. He passed on to me the request; that is, I believe that Mr. Reuben had called the chairman of the department, Professor Faverty. Professor Faverty is the chairman of the English Department at Northwestern University, and he was unable to serve, he had a heart attack not very long ago, and he asked me, because he knew of my background, having studied and practiced law, whether I would be interested, and also because I

am a specialist in American Literature and History, and I told him I would be interested.

Q. What was the specific request that was made?

A. I was—I think it was you, Mr. Reuben, who
1960 called me—and this is a very loose paraphrase: I was asked if I would be prepared to give an opinion on the relationship of two works—I think that was the beginning—that they would be willing to send me, and to express what the relationship is, whether there was any indebtedness or plagiarism, and I said I would be glad to, and it was then that you sent me "Why Was Lincoln Murdered?" and the Millard article.

I read both those books and wrote a letter in which I expressed my opinion with respect to the two works, that is—

Q. Do you have a copy of that letter?

* * * * *

1961 Mr. Martineau: When he said "you," he meant Reuben.

* * * * *

1962 Mr. Gertz: Q. All right. Now, is the document marked for identification as Plaintiff's Exhibit 1-A and 1-B of this date a true and correct copy so far as you recall of the original letter sent to Mr. Don H. Reuben as of December 5, 1954?

A. Yes. Let me see if there are any erasures. Sometimes—yes.

Q. And was that letter preceded by any conversations with Mr. Reuben or Mr. Martineau?

A. Yes, it was.

Q. How many conversations?

A. How many?

Q. Yes.

A. I think—wait a minute, I think I made a note. Just one.

Q. Was that that telephone conversation?

A. The telephone conversation, a telephone conversation in which he explained to me what he wanted, that is, one way or the other, to give my opinion, and that the fee would be paid regardless of what opinion, whether it was one way or the other or in the middle.

• • • • •

1966 Q. And you also concluded that the contents of True was largely unscholarly and not the result of research?

A. No, that the contents were distinctly second and third hand for the most part, but that the main tone was the sensational and exciting; that is, it is a far cry from the American Historical Review or the Atlantic Monthly.

Q. In other words, you were really equating it with that type of publication when you said that it wasn't anything that could be seen outside of a dentist's office or the like?

A. I don't—

Mr. Gertz: Will you repeat the question?

(Question read.)

The Witness: Well, no, I wasn't equating it with Harper's, but I set up categories from my experience. There are the different types, there are the so-called quality magazines, then there are the mass publications like Saturday Evening Post and Collier's which frequently have
1967 a rather high level of literary quality, and then there is a kind of sub-world of the sensational magazines, "True," "True Confessions." You can see on the newsstands—I believe they are generally classed in departments indicating that the prospective reader won't have to hunt all over the lot for it.

• • • • •

1970 Q. Isn't that same kind of material used in the Millard article?

A. There is much that is exciting, that is, the mere recounting of the circumstances, of the assassination, of the pursuit, even in the testimony that is cited is inherently exciting, and it is that material that is used in the Millard work pretty—I was about to say pretty exclusively. The emphasis is upon the use of that kind of material. Does that answer the question?

* * * * *

1971 Q. And that same kind of literary framework, involving the same material—

A. Well, not—

Q. The same material is used by Millard?

A. I wouldn't say literary framework. It is the same kind of style. That is, this is not all dry as dust. As scholarship goes, I think it exploits the interest of the material as it goes along, but that exploitation is always subordinate to the historical and documentary point.

* * * * *

1976 Q. Do you know whether or not Lincoln in fact was slumped over in the particular manner indicated in this picture?

A. I think one of the accounts—no, I am not—I am not sure just what was the position. What I mean to say when I say it was imaginative is that the artist had, taking the words, given color and life to them, and it seems to me that is an act of imagination.

* * * * *

1978 A. And I see nothing in the text that would have told the artist, "Place these people here," or "have this man looking down that way," and so on.

* * * * *

1980 Q. Now, would you summarize again the kind of advertising—without looking at the magazine—that appears in it?

A. That mark it distinctly a man's magazine and a

grown man? As I say, there are advertisements for guns and whiskey and beer and success advertisements, and a good many for the grooming of—of improving a man's looks, shaving stuff and fishing tackle and so on.

Q. In other words, pretty respectable advertising appears in the issue?

A. Oh, yes. I didn't want to say it was an immoral magazine, no.

* * * * *

1982 A. Yes, there is, I felt, much advertising here that would appear in—

Q. Life, or the Saturday Evening Post?

A. That is right.

Q. Or even Harper's or Atlantic?

A. That is right, but the amount and some of these particulars would not be in those publications.

* * * * *

1990 Q. Now, will you refer again to Defendant's Exhibit 4 and find where in Defendant's Exhibit 4 of May 16, 1955, there is any reference to Quote No. 2 of the plaintiff's affidavit?

A. Where in Defendant's Exhibit, that is—

* * * * *

1994 The Witness: All I can say, so far as an impression remains from this reading, that I was struck by the amount of material that was outside of Dr. Eisenschiml's book.

Mr. Gertz: Well, we will get to that part later.

A. You see, and as a matter of fact, that sustained me in—it aroused my interest that there was so much that I had not, not being a Lincoln scholar, suspected, and so I continued to read without, then, making any careful
1995 effort to see whether it bore upon these particular ones. I was interested in, shall we say, the general effect.

Q. All right. In other words—see if I have gotten you correctly—

A. Yes.

Q. When you saw those parallels you were struck by their similarity, were you not?

A. The very first time, yes, I fell into that, into that fallacy.

Q. Yes, you used the phrase, as a matter of fact, you were amazed by the similarity.

A. I may have used that, yes.

Q. And you were in fact amazed by what you thought were similarities?

A. Were similarities.

Mr. Martineau: Wait a minute, 'similarities between what?

The Witness: The two passages—

Mr. Gertz: Between what Millard said and what Eisenschiml said in the sixty-six quotes.

The Witness: That doesn't quite correctly state what amazed me.

Mr. Gertz: Q. You state it—

A. What amazed me was that in looking at these 1996 parallel columns I was amazed at the apparent resemblances between what I saw on this page, and it wasn't until I went to both of these books or, rather, went back to them that I realized how the context, as I pointed out this morning, completely altered the bearing of these quotations.

Mr. Martineau: When you say these two books, do you mean Millard's work and Dr. Eisenschiml's work?

The Witness: Yes, as given here, as given here in the affidavit.

Mr. Martineau: Yes.

Mr. Gertz: Q. All right. Now, you don't actually know whether or not Millard read any of the references given in Defendant's Exhibit 4 of this date, do you?

A. The only thing I can state positively is that he apparently—he apparently read Sandburg and the other, at least he quotes from Sandburg and he refers to the other one.

Q. By name he quotes from Sandburg?

A. Yes, as a matter of fact, there are all sorts of possibilities, if you ask me.

* * * * *

1997 Q. Let's turn to—

A. Perhaps I could add, ought to add to my answer since I was testifying about these two columns and my amazement, I was also subsequently somewhat amazed that so much work had been done before Dr. Eisenschiml, that is, although the footnotes made clear the indebtedness, yet that hadn't fully—I hadn't fully appreciated how much work had been done.

Q. Yes. All right. Now, on that subject, Doctor, will you tell me the name of one book prior to Dr. Eisenschiml's "Why Was Lincoln Murdered?" which purported to implicate Stanton in any way in the assassination of Lincoln?

A. Subject to the qualification that I am not
1998 an expert in the field, within my limited knowledge I know of no other work, and apparently, from the reviews, and this is a superficial kind of scholarship, I will grant you, from the reviews I gather that this hypothesis by Dr. Eisenschiml is a novel one and is perhaps a chief contribution to the deal.

Q. Yes. And, as a matter of fact, the only places where the hypothesis appears are in the Eisenschiml book and in the Millard article?

A. No, I—not in the Millard article. That is, there is a fragmentary allusion—I think I mentioned that—but it is not in any way central to the Millard article. As I say, if there is any central figure it is Wilkes Booth.

* * * *

2001 Q. And in so far as a knowledge of the Civil War and Lincoln has been essential to your study of the Adamses then you have studied it, but otherwise not?

A. Subject to this qualification: that roughly one may say five or ten per cent of one's research finally finds expression in writing, that is, you have to do a tremendous amount of reading and discarding.

* * * * * * *

2003 Q. And all of those details refer to what you call superstition and or fetishes and the like which are historically correct?

A. Not all. Not all. What he has done—

* * * * *

A. Certain of them simply mark folk superstitions. One, if I recall, was the moaning, hearing Lincoln moaning in his sleep, which is given an ominous turn.

Q. Didn't he in fact moan in his sleep?

A. I don't think so, I don't know that any scholar has so written, but the use of these, gathering them together in this pattern, as I have suggested, that use is distinctly a literary one and it fits in with the pattern that he has chosen for that particular portentous air, his arranging of the data.

Q. And that in your judgment differentiates his
2004 book length article from the Eisenschiml book?

A. That is one of the elements, that is, his stress, his stress on, shall we say, the supernatural, the element of fate. For example, the interpretation he gives at the end of two going mad and—let me take a look at that—two committed suicide. Well, those may be facts, but—

"But the Lincoln assassination case"—

I am now quoting—

—"would never die, nor would its sinister and terrible influence over those whose lives it touched.

"Mary Todd Lincoln went mad after that terrible

Good Friday night and was, for a long time, confined in an asylum for the insane. Although she was eventually released, she never fully recovered from the shock.

"Major Rathbone . . . recovered physically but not mentally.

"A few years later he, too, went mad and murdered his wife."

"And Boston Corbett . . . was soon adjudged insane."

Now, gathering together those and juxtaposing
2005 them, it seems to me it is clearly intended that the reader should feel that there is some occult relation between these facts, if they are facts, and the Lincoln case, and I submit that that relationship is in the realm of the supernatural.

Q. Doesn't Eisenschiml dwell upon the Good Friday and the omens and a whole series of things in the same fashion as Millard later does?

A. My recollection is that Dr. Eisenschiml is not taken in by the omens, he doesn't exploit them as if they were true. Millard does, and I am pretty sure that Dr. Eisenschiml did not when he referred to them intend that the reader should think that he, Dr. Eisenschiml, believes that there is any stock to be put in these omens, but they are—that is part of the data.

Now, it is that kind of data that is meat for Millard and so he draws it together, treats it as if it was true, because so many of his readers are obviously superstitious.

Q. That would indicate that Millard really isn't the kind of scholar who would go to sources, does it?

A. No, it is a question of what is a source—

2006 Q. And you get the distinct impression that that is the only kind of research, if you can call it that, indulged in by Millard in his article?

A. I get—that is chief, though as a Lincoln bug he may legitimately, and I think quite well, have been interested in original material, too.

Q. Now, you mentioned, I believe, as one of your qualifications here that part of your job was to detect what they used to call cribbing or copying or plagiarism of freshmen students?

A. Yes, I—

Q. Anyway, that was one of the—

A. Plagiarism, cribbing.

2007 Q. Yes.

A. Dishonesty.

Q. Yes, and as I understand it, one of your techniques was to take a passage from the essay or composition or answer and to parallel it with a passage—

A. To seek to find the source of it.

Q. With another work?

A. Yes. Yes.

Q. Which might be—

A. Or other works.

Q. —identical or—

A. Or very close.

Q. —very close, what you might call a paraphrastic copy?

A. Well, that raises a question of judgment, Mr. Gertz, and that is how close a paraphrase would be allowed before you would say that it was a dishonest or an improper one. Now, some paraphrases can be brilliant in themselves, as one of the most famous reviews of Madame Bovary, I think by Frederick Lewis Allen, is a paraphrase of the whole thing, remarkable condensation, simply a work of genius that he could have done it.

2008 Q. But, published as such?

A. And published as a review. It was one form of review.

Q. Yes.

A. Now, when students would copy, since we know that from the earliest time in school it is considered legitimate—one way a child is trained is first to copy literally, then to paraphrase, and the paraphrase has become very widespread both in published and unpublished works as a legitimate way of popularizing information.

Where the paraphrase, let us say, is fairly close, and the student would simply alter a word or two so that it became clear that the intention was felonious, and he used only one source so that you could not call it research, then unless the student had a very skillful explanation you would feel—I would feel that that was sufficient to say that that was improper.

Q. In other words, do I understand you correctly to say that in your detective work you would make parallel columns between the students' work and other work, and that would be you—

A. To a limited degree. I have—you are in a 2009 double—I was in a double function there. On the one hand, knowing the principles of scholarship and the danger is one reason why we did not give many grades of "F" for cause, because—

Q. You were unsure of your evidence?

A. Because the evidence was inadequate, was insufficient, and where you had a student who went into quite a few sources, and so what he has done has done has become his own work, and that is a common phrase, so he has made it his own, and part of his own theme, then often we would admire his research because he has explored among the materials and has tried to impress, to fulfill his assignment.

Q. In other words, you wouldn't be too severe if there were any evidence that he might have gone to sources;

even though there was a pretty close following you would give him the benefit of the doubt?

A. Well, in a way you make it out a criminal investigation, and I suppose it had some aspects of that, but the standard I would usually follow would be, was there any extensive copying, did it pick up the gist of the student's theme so that without it there would be no theme.

2010 As one girl handing in a paper purporting to be the experiences of a sailor on a submarine, and it seemed to me I had read that before, and I called up the commander of our Naval ROTC and asked him if he had a book by Commander Ellsworth—I think it was Ellsworth—

Q. Ellsberg.

A. Was it—

Q. Yes, Ellsberg.

A. Yes, you remember the sinking. He said yes, he had a copy, and I looked at it, and there I found the girl had just taken whole paragraphs, and they were bodily incorporated. That I would say is a clear case.

Q. What besides parallel columns or parallels did you use or do you use in your detection work among students?

A. You mean—

Q. What are the techniques other than the use of parallel columns or parallel passages?

Mr. Martineau: You mean what other principles or criteria did he use?

Mr. Gertz: Q. Yes, do you use in your detection work for copying by students?

A. Well, one of the—shall we say before one

2011 looks at a particular passage you read the whole thing. The whole essay may strike one as being beyond the powers of the student as you have come to know it. That is only prima facie because sometimes you discover it is a brilliant student, but if the whole essay

seems beyond his powers then you begin to investigate. It may be, as a matter of fact, that he didn't copy but he may have had a bright student who wrote part of it for him. There are all sorts of possibilities, so that one is that you see passages that are identified either by you or by another instructor, he knows the source of this, and it is a little transcript, or that taken as a whole the work gives rise to a suspicion that it is not the student's work, and then you begin to hunt. It may be copied, it may be someone else who had written it.

Q. Suppose you come across this situation: Passages which are clearly copied and in addition some passages which aren't copied or at least you don't detect that they are copied. Would you regard the paper as being copied?

A. If I come across a paper in which some passages are—

2012 Q. Clearly copied?

A. Clearly copied.

Q. And some passages either aren't copied, or you don't know?

A. Or the rest of the paper seems beyond reproach.

Q. You couldn't know or it is beyond reproach?

A. Well—

Mr. Martineau: If he doesn't know it doesn't have to be beyond reproach under our system.

The Witness: If there are passages that seem copied one practice we follow, a practice which I find in the publishing world is pretty generally ignored, is to tell the student, "Please use quotation marks, it is just common courtesy," and to cite the source, that is, as you know there is a technique "As so and so says," and as a matter of fact Millard uses that in his article. However, that is not—I have often felt embarrassed when I tell students that because we are holding students to a higher standard of, shall we say, literary probity and is common in our

own publications, newspapers, magazines and so on. If you pick up Reader's Digest I don't think you ever find a footnote, and yet those are mostly secondhand.

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2016 Q. Now, I will ask you, Doctor, to look at the affidavit by plaintiff for summary judgment, and particularly the exhibit thereto attached which gives the so-called sixty-six parallel columns which we have been calling quotes, quotes 1, 2 and 3.

A. Yes.

• • • • •

2018 Q. And do you know whether or not the Whig Press actually carried the news on the 14th of April, 1865, or on another date?

A. No, I assume that Dr. Eisenschiml's statement is based upon research. I assume that Millard's was based on some kind of secondary research. But it was not material to my opinion.

Q. If you were told that the Whig Press did not in fact carry the news of Lincoln's death on April 14, 1865, and Millard said it does, would you attach any significance to it?

A. If I knew that it had not—

Q. Yes?

A. —that somehow I learned—

Q. Yes?

A. I would simply conclude that he was romancing.

• • • • •

2019 Q. If, in fact, Dr. Samuels, Mr. Millard misread Eisenschiml and assumed that Eisenschiml was saying that the news was carried by the Whig Press April 14, 1865, when in fact Eisenschiml wasn't saying so, and the Whig Press did not carry the news that day, would it have any effect on your judgment with respect to whether or not Millard was copying?

A. Well, the question, it seems to me, is somewhat abstract as stated. Would his misreading be, in my judgment, an indication, a good indication that he had
2020 copied or utilized Dr. Eisenschiml's work?

Q. Yes.

A. In itself—I would hesitate to say that that was conclusive.

Q. But it would give you pause, would it not?

A. It might give me pause as part of—if I was hunting for sources where the man got his facts. It might give me some evidence that I would want to follow through, that is, in a literary exercise.

Q. Now, turning to quote 4, if you were told that Millard admitted that Eisenschiml was the first scholar to call his attention to the material therein contained, would that influence your opinion?

• • • • •

2023 The Witness: Well, that raises a somewhat different question, Mr. Gertz, and you run into that in scholarship a great deal, and that is a scholar not wishing—not wishing to plagiarize will look at the footnote, see the citation, and then go to the original source.

Mr. Gertz: Q. All right.

A. Now, if that is what you mean, that Dr. Eisenschiml put him on the track of Grant's Memoirs and then
2024 that he went, that is quite possible.

Q. Or then that he didn't go?

A. Or that he didn't go. Now, in my experience both practices are followed, and there are other possibilities. A man, because he is scrupulous, may say "Thanks for the hint," and go right to the source.

Q. All right. Now let me be more specific as to form. In Grant's Memoirs, Grant doesn't say that he skillfully slid over the incident, does he? Eisenschiml says that Grant slid over this thing or passed over it skillfully?

A. Passed over it—

Q. Skillfully?

A. Yes.

Q. And then Millard, paraphrasing, or using the same language, says that in his Memoirs, Grant skillfully slid over that incident. In other words, even if Millard had gone to Grant's book he wouldn't have seen any reference to sliding over a thing skillfully. Grant wouldn't accuse himself of sliding over it.

A. It is quite possible—well, it is quite possible that this is a verbal echo that lingers in the mind of a writer.

It might be one of the books that happened to be
2025 open before him. There are all sorts of possibilities why this was used.

Q. Wouldn't you say that the more reasonable supposition, when you read language like quote 4, is that the one is taken from the other? I am referring only to quote 4. I am referring to nothing except quote 4.

A. Now, that may well be—when I said that there were a couple that struck me—that for these specific details he may be directly indebted, and yet not use quotation marks, and that may well be one of them.

Q. And wouldn't you say that that is language or an instance to be considered carefully in passing judgment by you or anybody else?

A. As to—it depends, passing judgment as to what?

Q. As to—

A. That he borrowed or is indebted for a particular element out of many thousands?

Q. Yes. Let me phrase it this way, Doctor—

A. But you see what I mean, it has only slight relevance to the total comparison.

Q. In other words, what you are talking about is
2026 not whether there is copying of specific passages, you are referring simply to overall copying?

A. To any extended copying or any extended and substantial use so that it is clear, it is clear that the work is similar to the work that he is supposed to have copied from. That is, it seems to me that these details which you have listed do not affect this analysis that I have made, that is, there could be many parallels, as a matter of fact, many passages copied.

Q. Let me ask this question. Assuming—I don't say it is true, but assuming that every one of the sixty-six instances listed in our exhibit Millard actually copied from Eisenschiml—

A. That is a large assumption.

Q. Assuming that—

A. Yes.

Q. Would you say that notwithstanding the copying of the sixty-six quotes that overall the Millard article was original?

A. That is right, yes. Assuming—

Q. In other words, your conclusion—

A. I think this is a classic. It seems to me that these parallel columns are a classic illustration of the vice 2027 of the parallel column.

Q. I just wanted to make sure.

A. Yes.

Q. In other words, your conclusion isn't affected one way or another by whether or not in fact Millard in the sixty-six instances copied?

Mr. Martineau: That is what he said.

Mr. Reuben: What is the question?

The Witness: Yes.

Mr. Martineau: And that is what he said.

Mr. Gertz: I just want to be sure.

The Witness: Yes.

Mr. Gertz: Q. Now, how many instances would it take to persuade you of overall copying, Dr. Samuels?

A. There is obviously no formula, and since I became interested in this I find that that point has been made because you can have ten thousand considered similarities of words, of verbs, and so on. The important thing is, it seems to me, what is done with these materials? Do they fall into a pattern which constitutes an independent work? And it seems to me that in that analysis it is only by that kind of analysis that I was able to form the judgment that even if all these were true—

2028 Q. You mean were copied?

A. Yes, is Millard's work a substantial use, taking into account all these elements that I feel are imporant in such a determination? Is it true that Millard's work is independent, and I must confess that that was my considered judgment.

Q. It is an individual judgment? Some people would say one thing—

A. Well, all our judgments, I am afraid, are individual, but it is based, well, on long literary acquaintance, 35 years, a good deal of study, research, so that I feel it does reflect.

Q. Yes, and if another expert reached the opposite conclusion he would be entitled to his opinion, also?

A. I don't think it would be a sound opinion.

Q. In your judgment?

A. I think it can be demonstrated, and I tried to show the soundness that these are basic principles, and I do not see how anyone else applying these principles that are old to the craft of criticism could arrive at a substantially different judgment.

* * * * *

2033 Mr. Martineau: You remember very well my cross-examination. Dr. Riddle very frankly admitted that he saw the common sources that Millard—he admitted that he wasn't there, Millard may have—

Mr. Gertz: That is a misstatement of what Don Riddle

testified to. Don Riddle testified that he reached the conclusion that the Millard article was copied. Unequivocally he stated that is his conclusion.

The Master: Well, I will let him answer subject to the objection, but the record will speak for itself.

Mr. Gertz: The thing that disturbs me is the
2034 false impression of Don Riddle's testimony. It is before us and we can argue at length, but I think I have studied that testimony as well as anyone.

The Master: I have ruled with you now. Do you want to make another speech or do you want to get an answer to your question?

Mr. Gertz: I still say it disturbs me that there was a misunderstanding of what Don Riddle testified to.

* * * * * *

2036 Mr. Gertz: Q. Now, if a court of law, a court of competent jurisdiction, has decided that the quantity of the copying had nothing to do with the question
2037 of infringement, would you say that the Court is wrong?

A. That the quantity—quantity of indebtedness?

Q. Of copying.

A. The quantity of indebtedness—

Q. The quantity of copying.

Will you repeat the question, Mr. Shapiro.

Mr. Martineau: What court? Courts have passed on different—

Mr. Gertz: This is the so-called expert. I am entitled to see what his judgment is based on.

Mr. Martineau: His judgment is as a literary expert, not a legal expert.

The Witness: I am willing to venture my professional neck as to what I have studied here, but you are asking a question of pretty broad compass there. Now, it seems to me here, the kind of thing listed, that the quantity is

not relevant, but it would certainly be unwise of me in every case that a Court would be justified in ignoring in every case quantity. I have a lively imagination, and I wouldn't want to rule out extreme possibilities, but it seems to me there are cases in which there are—and this would be one—in which the mere quantity would
2038 not be controlling.

Mr. Martineau: Can't you break it down for him, Elmer?

Mr. Gertz: Q. In other words, in this case you would say that even if you were satisfied that Millard had a good deal of copying, you would say overall it wasn't infringement?

A. If he did a good deal—that is, a good deal of indebtedness which he has not acknowledged, that it would not overall be evidence in my opinion that his work was not original.

Q. Let me ask this: In your testimony today are you purporting to give legal opinions or simply the opinions of yourself as an English scholar?

A. That has puzzled me, Mr. Gertz, because critical judgments, it seems to me, skirt on the edge, and I suppose an expert opinion—I have tried to avoid legal conclusions, but I suppose it is unavoidable. It is some sort of mixed question. There is a question of fact—

Mr. Martineau: Of course, he is giving the same kind as Dr. Riddle had given, only his are sounder.

Mr. Gertz: Q. Let me ask this: Is it not possible in your judgment for a man to copy substantial por-
2039 tions of another work and yet in other portions of his work be highly original?

* * * * *

The Witness: Yes, there certainly is a possibility. Yes.

Mr. Martineau: But to what result? That is what I—

The Witness: If you say probable, and what kind of hybrid that would be, I try to run over in my mind, well, who has done it? I do know of cases—yes, I have an example. Herman Melville wrote a short story,
2040 "Benito Cereno," a very brilliant and original short story. He incorporated into the center of it the log of a ship and there is great debate among scholars, did he incorporate it in this form because he was lazy, or because this fitted into the artistic pattern? It is a highly original story.

Mr. Gertz: Q. The log was not original?

A. The log was not original, and there it is, and appears in a great many anthologies of American literature as a masterpiece of a short story, highly original, but it has—

Q. In spite of the copying of the log?

A. In spite of the copying of the log, literally page after page, and I have heard no one, read no one reflect upon Melville's original genius in writing the story.

* * * * *

2041 Q. Referring to the Millard article, will you in categorical fashion set forth what you regard as the highlights or the juice of that article?

* * * * *

2042 The Witness: Yes. The theme of the article, as I
2043 see it, is the mystery, the impenetrable and to a degree supernatural mystery that surrounds the assassination of Lincoln, and that its purpose is developed by exploiting all those elements that you would get in a Gothic short story such as Poe might write in which you would highlight—it highlights the elements of horror, of the tragic irony of this great man who was going unknowingly to his death, yet with foreboding, and the story, the story line, is one in which the operation of a malevolent and evil fate which necessarily or always accompanies

the downfall of a great man or a prince will affect the lives of all those who come into it, and it is that pattern, as I suggested, of impending evil, of omens, of portentousness, of irrationality, that finally has resolved, that fate has done its work and has left its mark, evil has left its mark upon all these people, and the various narrative patterns, as I suggest, are part of the way of selling this sensational story.

Mr. Gertz: Q. Now let's turn to page 105 of the Millard article, and let me read in the first column paragraph 5 from the bottom.

* * * *

2044 Q. Isn't that an integral part of the Millard article?

A. What do you mean by integral?

Q. The thesis of it, the thesis or theme of it, or part of the thesis?

A. Yes, I have thought about that because it seemed to me that in a sense it is not necessary to what the story is saying.

* * * *

2050 Would you not say; Dr. Samuels, that Millard in his article makes a good deal of use of those sixty-six quotes?

* * * *

2051 Q. —which portions of the Millard article in question you regard as more significant than those sixty-six points, specifically I want you to pick out—

A. That, Mr. Gertz, it would be impossible to work out, because what you are asking is to dissect something that is essentially organic and say this part makes it breathe, this part has other functions. The article is a complete article, and all of these fit into the pattern and the plan that he had in writing the article.

Q. And were integral parts of his article?

A. Were integral, but taken together in this isolated form [illegible] not a substantial part of the composition.

* * * * *

2055 Q. Would you say that the story of John Parker, the guard, is an important element in the Millard article?

A. It is a significant element.

* * * * *

2056 The Master: You gentlemen have been going steadily now for two and a half hours. Do you think this would be a fairly good time to adjourn?

* * * * *

2059 The Witness: Mr. Gertz, before we begin may I ask a question of you? You asked me a question, I think, almost at the end of the cross-examination Monday, and on reflecting it I felt that my answer needed to be modified, and I wondered if I might—

* * * * *

Mr. Gertz: Yes?

The Witness: And the question, I felt, asked for a categorical answer, and if I hadn't been weary I would have asked whether you were insisting on a cate-
2060 gorical answer or whether I might be permitted to explain why any categorical answer that I would make would be misleading.

* * * * *

Mr. Gertz: Q. I asked you both quantitatively and also qualitatively.

A. Yes, and what I certainly should have added was that this analysis would not admit either of a quantitative or a qualitative because the terms are misleading and they are terms that cannot properly be used in a literary analysis. It might be appropriate in one of the sciences, as in chemistry, for example, but that it throws the whole

analysis completely off base to suggest that if there
2061 are 150 words totaled that one can say that these
150 words as words on the page bears some significant relation. One cannot tell.

So when I got home I made a memorandum to clarify for myself the fact that no passage can be taken in a vacuum, that the basis of my analysis is that any passage within a literary work bears an organic relation to the whole business, and that each passage will serve from the literary point of view many functions.

For example, in that Parker passage, Parker is for one thing, an actor in a drama, in this narrative conceived as a drama. For Millard Parker is one more facet of this incomprehensible mystery that surrounds the Lincoln assassination, and I noted on page 108, column 1, how that is stressed, Parker's part

"He left a sinister shadow that will be the storm center for controversy for all time."

a characteristic kind of exaggeration and the use of "sinister shadow" is part of this tone which dominates Millard's approach.

"His career is full of contradictions and in con-
2062 sistencies and his action is shocking and incredible."

That is another aspect of the use of this Parker passage.

And he also, and this is both curious and it is paradoxical and by that token is characteristic of what Millard does with each of these episodes and with the data, that is, he is the one person who stays in character. That is one of the values of the use of the Parker episode. He is the one person who stays in character although from the analysis of his character he is the one person who ought to have gone out of his character, and the persons who should have stayed in character go out of character. I made that point.

Now, what I mean to say is that to answer what is the significance of the passage one has to consider those things, one has to consider the stylistic, the satire, for example, the piquant details about the bawdy house and so on, and then also the purpose that is Dr. Eisenschiml's treatment, as I look back upon it.

Parker was a figure ignored by historians, and as Dr. Eisenschiml's purpose, which controls his work, is
2063 to correct history, therefore he supplies the data which historians have ignored. He devotes a chapter to Parker, but Parker does not lend itself to the dominating thesis, although there are, I believe, two references to Stanton even there, but they are inconclusive, whereas in Millard's case Parker's significance, one of the great things is the dramatic irony that so great a man, the safety of so great a man, should depend on so weak a vessel.

Now, that is the explanation that I felt should have accomplished it.

2065 Q. Yes. In other words, that additional fee was dependent upon your appearing as a witness in behalf of the defendant?

A. Well, the additional fee would be paid if I appeared.

Q. Yes.

A. There was some question, as a matter of fact, whether I would.

2076 Q. Is this a fair statement: that in no instance in connection with Defendant's Exhibit 4 of said date do you know if in fact Millard read or consulted the work, or when he did so, or where he did so?

A. Only inferentially, only from the source I have told you, or from—

Q. Or from deduction or induction?

A. Or inferentially from the statement in the article itself in which he asserts, and that by ordinary scholarly standards would be, shall we say, prima facie evidence that he has consulted the source.

2077 A. May I add, there is another inference that I would make, and that is that the article is based upon a considerable amount of research.

Q. That is your inference?

A. That would be the inference.

Q. Yes.

A. That is, one could hardly spin out so many details that jibe with my general knowledge of the picture.

2081 Q. I mean up to this point did you actually take each page of Defendant's Exhibit 4 of May 16, 1955, and compare the excerpt with the Millard article and with the Eisenschiml books?

A. In some cases. I cannot specify now and I believe I stated that before.

Q. In a few cases?

A. I started out by attempting to do that, and then I found that I did not understand the numbering, did not have access to all the documents, so that my plan to inform myself broke down, but in the process quite a few pages I looked at and I think I remarked that I wasn't surprised at how full the detail was, and in my ignorance I had not known the possibility that such sources might have been used for Millard's article.

Q. And in quite a few instances you didn't actually make the comparison, you did not actually make it?

A. In quite a few I did not, no. I suppose ultimately in most I did not, and then finally I just was reading them for the light it threw on the whole assassination.

2083 Q. All right. Now, are you contending, however, that none of Millard's article is copied from any part of Eisenschiml's books?

A. Well, again, when you use the word "copied", you are using it in a meaning that is new to me. That is, it appears to me—it appears to me, simply on examining the documents, that some of Millard's research was done using Dr. Eisenschiml's works since they are authoritative. It seemed to me that that was a good source to go to, and I inferred that some of it was, the use as any scholar would take circumstances and details, ideas and so on.

Q. Yes.

A. But as a historical source.

* * * * *

2086 Q. Have you ever written anything on the subject of copying or infringement?

A. No, I have not. I have been obliged, however, in my work to pay a great deal of attention to it, that is, literary indebtedness which, as that book there would show, was a very important concern of mine (indicating), and the techniques—

Mr. Reuben: By "that book," what do you mean?

The Witness: "The Young Henry Adams."

* * * * *

2087 Q. I am asking you not to give any more than a listing of the tests that you employ in determining whether or not there is copying.

A. In some cases—to answer that question I would have to point out that there are in some cases specific tests—

Q. Such as—

A. And in others—as—to go at it backwards, which I felt is the approach when you approach through parallels, it would be through identity of language. However, once having some sort of clue or hint or suspicion concerning two works, then the problem is to take the works, that is,

if one wants to approach the question of originality and plagiarism, to read the two works, as I suggested, and to see what their configuration is.

* * * * *

2089 Mr. Gertz: Q. I am just asking you to give the categories.

A. Yes, but it depends on the kind of work. First of all, you have to determine the genre: Is it straight history, is it a combination of fact and fiction, is it fiction, is it poetry? Each one of those works then would have 2090 its own body of principles by which you would analyze it. You can't go at it very crudely.

Q. In connection with the judgments you have had to form with respect to cheating or copying by students have you ever found that you had been wrong in your judgment?

A. Now, that cannot be answered categorically.

Q. In other words, you don't know whether you had been right or wrong in every instance?

A. I have to be the Almighty to know. I could say this: that sometimes I have suspected plagiarism and formed a hypothesis and then discovered on interviewing the student that the student was brilliant. There are all sorts of variations.

Q. And you sometimes found that after you concluded there was cheating you later, on afterthought, changed your mind?

A. Yes, that I think, would be a fair—

Mr. Martineau: You mean at a particular stage of the investigation?

The Witness: Yes, I take it the question has no specific application.

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2099 Mr. Gertz: Q. You mean the manuscript itself, the original manuscript?

A. Yes, I saw a photostat of the manuscript.

Q. The original manuscript?

A. The original manuscript, I believe.

* * * * *

2105 Mr. Gertz: Q. Now, in connection with your studies to appear as a witness in this cause, Doctor, have you also tried to find the similarities between the Millard and Eisenschiml publications or simply the dissimilarities?

A. I don't know that I—I don't think I consciously was hunting for either, but I felt that my work in this case
2106 would require that I expose myself to material to see what inferences I could draw.

Q. In other words, you made no effort to see if there were any similarities between the Millard article and the Eisenschiml books, did you? You were just looking for dissimilarities?

A. No, no, I—may I put it this way? I was concerned to see if I could discover them, and where the similarities, the alleged similarities, had been pointed out, I looked at them.

* * * * *

2111 Mr. Gertz: I would like to interrupt. I have asked him simply to list similarities, and I would like him to stick to the question.

A. Well, the similarties vary, counsel.

The Master: It is rather difficult for the witness to do that because—

Mr. Gertz: It is the same as any other witness. He is supposed to answer the question.

* * * * *

2113 The Witness: B, that Parker was a key figure. There is a similarity in this, that Parker appears as an actor in the drama in both, but that he is a key figure, because in Dr. Eisenschiml's book there is a quotation

that his keenness consists of this fact: that but for him, but for him the assassination would not have taken place, whereas in Millard the key point is the dramatic irony that the life of Lincoln should hang on such an irresolute and feeble character.

* * * * *

2115 Mr. Reuben: Do you want the books?

Mr. Gertz: Q. Anything else you want, Ernie, just ask for it.

* * * * *

2116 A. Now, so far as paragraph 19 and 20, so far as these allegations are allegations of historical facts which may have been used—

Q. Or conclusions or surmises.

A. Yes, which in themselves would be facts relating to the transaction, that there is a considerable amount of similarity in that respect.

Q. That is right.

A. Yes.

* * * * *

2117 A. Before giving a general opinion about 19 I would want to qualify that by saying many of these allegations express interpretations of the data. That is, the significance that Stanton refused to have Eckert act as Lincoln's bodyguard, it seems to me, is a clearly shared fact, but there are such statements that I would want to qualify. The behavior of Hanscom and Harry Ford—that is, as historical facts, I think one may say that there is a sharing of historical facts, but there is a different interpretation.

* * * * *

2119 Mr. Martineau: Would it clarify it if I ask him does he mean then, just to sum it up, that the historical fact recited in paragraph 19 and all the subparagraphs is similar, but that the significance or infer-

ences drawn or use made by the Millard article or Dr. Eisenschiml is in many instances different.

Mr. Gertz: Q. Is that a fair summary?

A. That is precisely what I said, yes.

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2121 Q. Now, did you find similarities as to the deductions, conclusions and speculations enumerated in said sub-paragraphs between Eisenschiml and Millard?

• • • • •

2122 A. Yes, because it is my impression that Millard rather carefully avoids answering the kind of "why" that is so much of the essence of Dr. Eisenschiml.

Q. All right.

A. That is, he will have the fact, let us say, that the telegram was suppressed; that the record was doctored, but he always uses it as another example of the mystification and of bafflement.

• • • • •

2126 Mr. Gertz: Q. In forming a judgment as to copying, do you consider paraphrases, abridgements, imitations?

A. In forming a judgment as to copying of particular passages?

Q. Yes, of any work.

Mr. Martineau: Of what?

Mr. Gertz: Q. Of any work. If you are trying to reach a judgment as to whether or not A copied from B do you consider paraphrases, abridgements, imitations?

A. I would say that that would enter in only at a certain stage of the analysis of the plagiarism. That is, once having satisfied myself that one work is substantially an imitation of another, then I would seek for the
2127 details and the character of that imitation. Once I was satisfied that they were not imitations then my interest becomes, shall we say, a purely literary one, that

is, the nature of his indebtedness and to account for the difference between two works that may share, have many elements in common, see?

• • • • •

2128 Q. If a writer is often inaccurate in a particular
2129 work when he is quoting from a source, is it not likely to show that he did not actually go to the source?

A. There again part of the inaccuracy may very well—and I am suggesting possibilities because that is what you are asking me—may come from the fact that what he is doing, as in Millard's case, or students, as I have found, do not demand—it is not a word of scholarship, it is not to be subjected to careful scrutiny, and all he wants is raw material, so that you find, depending upon the purpose, often much carelessness in the transcriptions.

Q. Your judgment is that Millard was trying to write what was essentially a work of fiction?

A. Of fact fiction, a kind of hybrid genre.

Q. Like science fiction but his is history fiction?

A. Well, I haven't read enough science—no, no, science fiction—yes, some of that was given to me down in Florida. No, he wasn't writing—science fiction is something different.

Q. History fiction, like science fiction?

A. No, I might suggest it is more like Lytton
2130 Strachey's "Biography." It is a fictionalized form of biography which may yet be based upon a great deal of historical research. It is a bastard form of writing.

• • • • •

2133 Mr. Martineau: Had you finished your other answer to Mr. Gertz' question when he asked you about whether or not it was fair to borrow and not acknowledge?

The Witness: In popular writing I would say yes.

Mr. Martineau: That it is fair?

The Witness: Yes.

Mr. Gertz: Q. Substantial portions?

A. Substantial, yes.

• • • • •

2134 Q. Now, if Millard has admitted that in several instances he took his material from Eisenschiml, and if the internal evidence shows that in other instances he did not go to the sources, but took his material from Eisenschiml, and if he has testified in a deposition that he would not think of disputing Eisenschiml's word as to the language or the substance of the sources, do you think it probable that Millard actually went to original sources in any instance or in more than a few instances?

• • • • •

2136 A. I don't think one can make a legitimate inference from that. There are just too many variations.

• • • • •

2138 Q. In other words, you think what Eisenschiml states as to the explanation is a historical fact?

A. That may well be, yes Yes. By the way, it may be a mistaken hypothesis and still be a fact, still be borrowed as a fact.

Q. Did you ever hear the theory expressed by George S. Bryan that Stanton—or by Jim Bishop—that Stanton refused to permit Eckert to go because he wanted to discourage Lincoln from attending Ford Theatre that night?

2139 A. What was that?

Mr. Gertz: Will you repeat that?

(Question read.)

The Witness: Do I remember that statement?

Mr. Gertz: Yes.

A. Have I encountered it?

Q. Yes.

A. I don't know. I have looked at Bryan.

Q. At any rate, that is a different explanation from the Eisenschiml explanation?

A. Yes, and that, too, is a historical explanation.

Q. In other words, even though they are directly contradictory they are both facts?

A. Oh, yes, from the point of view of history. The Copernican theory was a fact and could be cited and the Ptolemaic theory was a fact, and can be cited as a historical fact, that is, the holding of such a theory.

Q. Do I understand you correctly that you regard a hypothesis as a fact?

A. As a fact. When expressed it becomes—when the facts are data of history.

Q. Let's take your own field, Dr. Samuels. You are unquestionably one of the leading experts on Henry
2140 Adams. Do you believe that Henry Adams wrote the "Diary of a Public Man"?

• • • • •

2152 Mr. Martineau: Excuse me, Elmer. May I interpose this suggestion at this time or objection? I understood that in the first question, and I didn't object to it, Dr. Samuels was asked to take this exhibit and see if these various chapter headings did not correctly summarize the related chapters in Dr. Eisenschiml's book, just that and nothing more.

Mr. Gertz: No, and passages and parallels in Millard's article. I clearly stated that.

Mr. Martineau: As to that, it seems to me that
2153 that is a very peculiar way to cross examine, to take a document like this. Why shouldn't he put the questions to him?

Mr. Gertz: He has stated that Millard's article is not copied from the Eisenschiml book, so I am taking—

The Witness: Or it is not a plagiarism.

Mr. Gertz: A copy in the legal sense of the Eisenschiml books.

The Witness: Or in the literary sense.

Mr. Gertz: No, this is a lawsuit and it deals with what the cases and the law say about what is copying or plagiarism, not any special meaning you or anybody else attaches to it. It is what the cases and the law say.

Mr. Martineau: May I respectfully suggest that the law also lays down some rules as to cross examination, and I never heard that you could show a witness a document which contains various inflammatory argument, and then say "Now, will you please say whether this is a correct summary of this book," and then "Isn't the rest of it true, too" as to the other book. I think that is an improper way to proceed.

* * * * *

2156 Q. Is there anything in Chapter IV of the plaintiff's book which is not in Millard?

Mr. Martineau: I object to that. I have no objection to your pointing out some particular fact and saying, "Isn't it true, this isn't in Millard?"

Mr. Gertz: This is cross-examination. I submit that when you spent six days cross-examining an expert I have the right to spend a reasonable time, and have a reasonable scope in cross-examination.

The Master: There isn't a question about that, but some of your questions there—

Mr. Gertz: They are more to the point than the questions asked by counsel.

The Master: Well, that is your opinion, of course.

Mr. Gertz: That is right, it is my opinion, and it is the case.

Mr. Martineau: The only reason for my extended ex-

amination of Dr. Riddle was, it was difficult to get an answer.

The Master: What is the question?

Mr. Gertz: Read the question. It is the heart of the case.

2157 (Question read.)

Mr. Martineau: Do you understand the question?

The Witness: Yes, but the question, again, cannot be answered because one might have to go to work on what do you mean by "anything." If you are asking if I—may I conjecture a question—if I am being asked, are there similar facts, historical facts in both books, I think I have already testified that there are, historical data.

* * * * *

2158 Mr. Gertz: I believe that the heart and all of the basic statements in Chapter IV are copied in the Millard article, and I believe that with respect to the other chapters set forth in Plaintiff's Exhibit 20-A.

The Master: Then it would be up to the witness on the strength of your question to answer to—

Mr. Gertz: To study that.

The Master: He will have to study the entire 2159 chapter as against the Millard article.

Mr. Gertz: That is right. That is right.

The Master: How long will that take you to do?

Mr. Gertz: Here is what we could do. Maybe we better suggest this and when he comes back he could be prepared. He could take all the time he wants outside of the hearing.

The Master: You better take it in the hearing so that it goes on his bill.

Mr. Gertz: Well, I would suggest that that is an unreasonable request on the part of the Court. The Court should—

The Master: I just said that facetiously. Don't let yourself get perturbed.

Mr. Martineau: Would you like a phenobarbital, Elmer? You are a little hot under the collar today.

Mr. Gertz: I am, and with cause.

May I state for the record then, since we will not be through with this cross-examination apparently today, I am going to request the witness to read the following chapters of the Eisenschiml book "Why Was Lincoln Murdered?":

Chapters III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI of the Eisenschiml book "Why
2160 Was Lincoln Murdered?"—

The Witness: For what purpose?

Mr. Gertz: Wait a minute, I am going to state that. And to compare their contents as to factual material, source material, language, whether similar, paraphrastic or abridgment, and the Millard article, in order to determine similarities and dissimilarities for the ultimate purpose of determining copying and non-copying.

Mr. Martineau: Well, the witness has already testified that he has read the book. Now, why don't you ask him some questions, proper questions?

Mr. Gertz: Whatever I have asked him about the specific questions I am told he will have to study it in order to answer it. I want him to study it.

Mr. Martineau: Each of your questions—

The Witness: Your Honor, may I request with respect to this proposed assignment that I am being asked an impossible assignment whether as a human being—

The Master: I can see that immediately. What you should do is suggest the contents of that book—

Mr. Gertz: That is exactly what I am doing, Master.

2161 The Master: All right, go ahead and do that, but to ask this witness to go out and read nine or ten or fifteen chapters and then come back—

Mr. Gertz: He says he has read them, your Honor, and he says he is not prepared to discuss them now, so I want him to be adequately prepared.

The Witness: Not within the framework—because within the framework and accepting the premises which underlie your question it is impossible. It would be the work of months, and I venture to say we could never agree as to what the things within this chapter—

Mr. Gertz: Q. In other words, this preparation should have taken you months and you haven't taken months?

A. Not at all.

Q. In order to appear?

A. Not at all, because the question you asked, if I may respond to that—

The Master: Just a moment. We can save a lot of time. If you have any questions to ask with reference to anything in those chapters having something to do with the Millard article, you can ask those questions, but to ask this witness to go out and take this book and read five or six or seven or eight chapters and then come back here and start all over again, I don't see—

2162

Mr. Gertz: I am asking him then if the Court does not want him to do it outside of the hearing, I am asking him now at the hearing to point out those similarities and dissimilarities between the said chapters and the Millard article.

The Master: Well, are you making him your own witness for that purpose?

Mr. Gertz: No, this is cross-examination, your Honor.

The Master: If you are cross-examining him, ask him about this particular chapter and this particular part of Millard article and let him distinguish as to whether Millard took this—

Mr. Gertz: In other words, your Honor is saying that I cannot question him on this?

The Master: No, but you are asking the witness to do something that is almost impossible.

Mr. Gertz: I would like the Master to define what he thinks are the limitations of my question so that I know exactly what you have in mind and can abide by it subject to my objections to the ruling.

The Master: You can take whatever portion of
2163 any of those chapters you feel has been pirated by Millard and ask him and get his opinion with reference to those things.

Mr. Gertz: I am stating for the record that it is our contention that the entire contents of those chapters have been plagiarized.

Mr. Martineau: He denies it. The witness says it is not so.

The Master: He denies it. Now you have got to establish that by your questions. That is what you claim.

Mr. Martineau: That is where to start Elmer.

The Master: You are not going to establish it that way, by telling him to read ten or twelve or fourteen chapters.

Mr. Gertz: He supposedly has read it. I don't know whether he has read it or not because—

The Master: But with reference to those particular portions of those chapters that you think have been plagiarized, that is all, and get his reaction.

Mr. Gertz: Your Honor, are you saying that I have to take specific portions in each case?

The Master: Why, certainly.

The Witness: Now, these are marked, aren't they,
2164 as a matter of fact, and these appear in the plaintiff's affidavit, and I think I have already testified as to each of these alleged similarities, so it seems to me that we have got at the gist of the plaintiff's point with respect to this chapter and the other chapters.

Mr. Gertz: All right. I am taking an exception to the Master's ruling and I will proceed with other questions.

The Master: Okay.

Mr. Martineau: May I make it clear, your Honor, that I am sure that we have no objection to any specific question being asked about a specific part of that chapter, and I am sure that Dr. Samuel is prepared to answer that—

The Master: I think I already made the statement that he can take anything of those chapters, present them to the witness and present the Millard article, and then get his opinion as to whether Millard took it from Eisenschiml.

Mr. Martineau: Precisely.

2165 Q. Would you not say that verbally those two quotes 13 are similar?

A. Before I answer that I would have to point out that these are not two quotations, but these are in both cases condensations of Millard. It is shorter and this is page 11, 12, and 13, Mr. Gertz, of Mr. Eisenschiml's book.

Q. All right, look at those pages of Eisenschiml and look at the page of the Millard article. Supply anything additional.

A. I would say that the data, much or most of the data contained here, appear in both works.

Q. Would you say the language is also the same or similar?

A. There are similar words.

Q. Would you give examples of a similar word?

Mr. Reuben: Let him finish his answer.

The Witness: Let me show you what I mean and really how tricky the problem is. That is, the fact that he
2166 was born—in how many different ways would you state that? It is natural to say a man was born Frederick County and Frederick County, and Virginia and

Virginia—are those copies of plaigiarisms? Those are facts, and that goes for the others.

Now, there are similar words in both, but that there is a deliberate pattern recognizable to show a copying, it seems to me, is just open to question.

* * * * *

Q. Millard 108. All right, you see in the Parker passage the words "profane, coarse and insolent language"?

A. Yes, "profant, coarge and insolent."

Q. "and insolent langsage."

A. Yes.

Q. All right. Now do you see in the Eisenschiml book "violent, coarse and insolent language"?

* * * * *

2171 The Witness: I don't want to appear as an advocate, but, rather, to point out here that this kind of verbal echo, transposition, is very common.

Mr. Gertz: Q. So that makes it right?

A. No, but it is also not wrong unless—unless it is the soul of the thing. If this were done, if the verbal echo was so that a substantial part were verbal echo, then it would seem to me there would be no question that there was felony on the part of that writer, but with this small fraction I do not believe that it materially affects an opinion one might form of the entire work. I think it is unfortunate that our standards of scholarship are such, but—

Q. Do I understand you correctly that if all Millard did was to paraphrase the material of Eisenschiml with respect to Parker by your lights it is all right?

A. No, I don't believe that this is a paraphrase. Certainly it is not a close paraphrase, and I don't think that the facts are related in the same order, particularly when you consider that there are three pages which contain

other facts. There is a multitude of facts here,
2172 whereas those that appear in Millard—it is much smaller, that is, he has evidently taken what serves the particular purpose.

Q. All right. Would you say, reading 13, 14, 15, 34 and 34-A together—will you take those numbers down?

* * * * *

Q. Will you take those numbers down?

A. 13, 14—

Q. 15, 34 and 34-A.

A. 13, 14, 15, 34 and 34-A?

* * * * *

2173 Q. All right. Now, would you not say that in those quotes Millard pretty closely paraphrases Eisenschiml?

A. I don't think so. I don't think so.

Q. Would you say there is a—

A. When you say closely paraphrases, as set up here there is an appearance of paraphrase.

Mr. Reuben: You mean in the exhibit?

The Witness: The exhibit, yes, and that is the vice of the exhibit.

* * * * *

2175 Q. All right. Still asking about the Parker material, will you set forth—take all the time you want—any material in the Millard article with reference to John Parker which is not also contained in the Eisenschiml books?

A. That is an interesting question. I might comment that there are, how many pages here—in this chapter it runs from page 11 to 21, that is ten pages. I am
2176 being asked what else is there in this chapter—

Q. No, no, you are not being asked that. You are being asked this, and you listen, Ernie; because I don't want to mislead you, I am asking you this question

and it may take you a little time to discover the answer. Is there any material about John Parker in the Millard article that is not also found in the Eisenschiml book "Why Was Lincoln Murdered?"

Mr. Martineau: Do you mean, Elmer, factual?

Mr. Gertz: Any kind, factual, language, any kind, any place where Parker is mentioned in the Millard article.

The Witness: You are asking me to account for this phenomena, why it has taken 13 pages as against this short extract?

Mr. Gertz: Q. No, I will phrase the question—

A. I would have to go into the creative methods of Dr. Eisenschiml to account for the difference.

* * * * *

2180 Q. Now let's turn to quote 3. You know what I mean by quote 3, Doctor?

* * * * *

2182 Q. "It would appear to you that it probably is misreading of Dr. Eisenschiml—

A. That is right, with respect to the date.

Q. Of the issue?

A. That it should have been—in the original it appeared as the 19th.

Q. Yes, that is right.

A. And that instead of going to the Middletown Whig that Mr. Millard took the date from Dr. Eisenschiml.

Q. His misreading of Dr. Eisenschiml. Wouldn't it appear that way to you?

A. Well, or a typographical error.

Mr. Martineau: What you mean is, it is different from Dr. Eisenschiml?

Mr. Gertz: He misread Dr. Eisenschiml.

Mr. Martineau: In other words, Dr. Eisenschiml says it is one day and Mr. Millard says it is another day, and from that you infer a misreading, is that your point?

Mr. Gertz: Q. Let me ask this question so I can clear it up.

A. Does it appear—

Q. Will you listen to the question? Would it not
2183 appear from Millard's quote 3 and the issue of the Middletown Whig Press of April 19, 1865, that Millard could not have gone to that issue for his information?

A. Well, that he did not go, it seems to me, seems very likely from what—

Q. That is all I want.

A. —from what has already appeared.

Q. That is right, it is clear, in other words, from the context—

A. That there is a similarity or that Dr. Eisenschiml's book is the source for this information.

* * * * *

2187 A. But to suggest that the occult, that it is the occult that thereafter becomes the controlling theme, is to insult Dr. Eisenschiml as a scholar. It is one thing to use this rather dramatic introduction of this chapter.

Q. Suspenseful?

A. And don't think I missed this when I read it. The difference between the first and the rest is a rather marked one. I think that within the limitations of scholarly
2188 method Dr. Eisenschinal has tried to make his book exciting, but he was forever restrained in the development by the logical necessity of his argument, whereas Millard was not so restrained. The occult becomes the central theme, that is the point—

Q. You would question that in that passage—

A. In that single passage there seems to be—

Q. Suspense?

A. For rhetorical purposes—no, not suspense. There is a hint there of—

Q. Suspense and confusion and the occult?

A. No. Oh, something supernatural, there is that one hint, but it is not and it could not be the center of this book.

Q. All right. Now let's turn to page 30 of the Eisenschiml book, "Why Was Lincoln Murdered?", and let me read this aloud:

. . . . .

2190 Q. Isn't that passage much like Millard?

A. No. It is the use of suspense where there is a narrative purpose and within the framework that I have already suggested, that the atmosphere that is integral to Millard is quite different from the suspense that is inherent in any logical demonstration. This is the hypothesis of the book.

. . . . .

Q. Now let's turn to page 67, the short paragraph just above the break. Let me read that.

. . . . .

2191 A. I would say there are many examples of suspense that are to be found in very work of scholarship, but the determination of the character of a work of scholarship is one thing, and of a work such as I have described, this hybrid fact-fiction, is another.

Q. Let's now take the matter of the occult. Let's turn to page 40 of the Eisenschiml book. Did you notice that Chapter VI, "*Premonitions vs. Secret Service Reports*"?

A. Yes.

Q. That chapter is pretty full of those premonitions?

A. Yes, they are taken as reports; but since there is also entered into the affidavit the book "Shadow", it is interesting to see Dr. Eisenschiml's approach as a scholar to premonitions. He takes no stock in them. Millard does.

Q. Let me read from page 40 of Eisenschiml.

2192 Q. Doesn't Eisenschiml have the same kind of premonitions, the occult, as—

A. I have already testified that much of the occult and the superstition is reported by Dr. Eisenschiml as a
2193 very good reporter of the whole climate that surrounded it, but we get an indication in Dr. Eisenschiml not of Lincoln's—Lincoln may well have been superstitious, but we are concerned here with the writer's attitude toward it.

Now, as I have said, Millard uses it as a theme and motif running through his entire article, whereas here Dr. Eisenschiml is referring to it in his analysis of the psychology of his characters.

. . . . . .

Q. Let's turn to the first page other than the title page and so on of Dr. Eisenschiml's book. It is pages 3 and 4.

. . . . . .

2194 A. It is not. In detail—this would be unfair if we were going to say, for example, that there was borrowing by Dr. Eisenschiml, this sort of thing is not essential to the purpose of the book which is dealing with the question "Why". Now, as I think I pointed out, Dr. Eisenschiml is more than a scholar, he is also a writer, so that in handling his materials there are these touches, but that the occult or the superstitious controls the handling of his material is to do violence to what the book is about.

Q. Let us turn to pages 43 and 44 in the Eisenschiml book.

. . . . . .

2195 A. Oh, no, Mr. Gertz, if I may say so, it is an almost frivolous treatment of the material. That is, what Dr. Eisenschiml has given here is a reflection and analysis of the character of Lincoln at this particular time, and that is not at all what I explained was Millard's handling of the material. It seems to me that Dr. Eisenschiml

has handled this with tact and discretion, but for an
2196 entirely different purpose.

• • • • •

2208 Q. All right. Now read from plaintiff's affidavit, sub-paragraph 19-R. That is not one of the quotes. That is in the affidavit.

A. Yes.

Q. 19-R.

A. 19-R?

Q. Yes.

A. That is —

Q. Paragraph 19, sub-paragraph 19-R.

A. The statement, "The fantastic clues left in Atzerodt's room."

Q. Yes. Now, do you see any similarity between 19-R and the excerpt from DeWitt's book?

• • • • •

2209 Mr. Gertz: Q. Is there any similarity of language, of substance, of information, of material?

A. Oh, no. No.

Your Honor, that is so vague that I can't answer to it.

• • • • •

2210 Mr. Gertz: Well in this document which you submitted you refer to the affidavit, paragraph 19-R This reference is by you.

The Witness: Well, that is not—

Mr. Martineau: Strike it out if you don't like it. It was just suppose to be for help.

• • • • •

2218 A. Yes. Well, quote 50 contains—am I to take it, because I did not prepare this—

Q. You are only supposed to answer questions without considering what the implications are.

A. I have to understand what is the framework of the question.

Q. You don't have to know the motive that I have. The motive is to discredit your testimony, if that is what you want to know. The question is a fair question.

A. That is only one—that may be the motive, but what I need to know frequently is what is the framework within the question being asked.

Q. The framework is what I referred you to, quote 50 and page 83 of DeWitt.

A. And this is cited as a source? Is this cited as the exclusive source?

Q. I don't know what it is cited for.

A. You see, I don't know, either.

. . . . . .

2220 Mr. Gertz: Q. Will you permit me to ask questions? When there is a question before you—

The Master: All right, answer the question.

Mr. Martineau: Why don't you try and be a little more courteous, Elmer?

Mr. Gertz: Well, I will tell you why I am not more courteous. I object strenuously to a witness refusing to answer questions and making speeches instead.

Mr. Martineau: He is not refusing to answer
2221 questions.

I am going to say right now that I am going to object to the whole line because it is completely not germane to his direct examination, and if there are any errors in there, why, I will accept full responsibility for them. If there are any errors of reference, and I will say further that the only reason that the person in our office, whom I will put on the stand if you want, who prepared this Exhibit 4 apparently put these down there was to aid the Court and counsel in getting to—

Mr. Gertz: In what?

Mr. Martineau: In getting to the pertinent quotations.

If they are wrong, as I say, I will accept full responsibility for their being erroneous.

Mr. Gertz: I am entitled to show these things.

* * * *

2226 Q. Now look at 20-A of plaintiff's affidavit. That refers, doesn't it, to the inaccuracy of the conventional story of Lincoln's assassination and efforts made to becloud it. Do you see anything like that in the excerpt from DeWitt?

A. Before I answer, and I think that this qualification must accompany every answer, I would say that these statements in my judgment are not relevant to what I was testifying about or to the whole inquiry. These are summaries, and the accuracies of this summary I do not know. As a matter of fact, I would, from what I have gone over, I would say I would question that these are accurate summaries.

Mr. Gertz: Will you repeat the question? I would like to get an answer.

Mr. Martineau: First, may the record show that when the Doctor said "these statements," he meant the statements in 20-A of the affidavit.

The Witness: That these are all statements concerning ideas, historical facts, and I think I have already testified that.

2227 Mr. Gertz: Q. That you are not an expert on the assassination?

A. That I am not an expert on the assassination.

Q. All right.

A. But I am an expert on methods of research and scholarship, and that these are allegations with respect not to materials that are copied but to literary sources.

Q. All right.

A. And therefore are basically irrelevant.

* * * *

2237 Mr. Martineau: Before we go any further, your Honor, I would like to interpose an objection. This witness did not prepare his exhibit. If there are errors in it I will accept responsibility for them.

Mr. Gertz: This witness testified—

Mr. Martineau: Let me finish.

Mr. Gertz: Directly with respect to this exhibit.

Mr. Martineau: Let me finish. I am addressing the Court, if you please, and I suggest that this witness,
2238 in the first place, on direct examination did not present himself as any expert in the assassination of Lincoln or the Civil War; he did not prepare this exhibit at all and didn't even testify about it except, I believe, to say that he had read it.

Mr. Reuben: On cross he said it.

Mr. Martineau: On cross examination he said he had read it as one of the papers he had looked at. He isn't in any way responsible for it, and I repeat that if there are any errors of inference, which is all these things are, that they are pertinent to one quote or another from some affidavit, I submit that that is just a matter of argument, and this is arguing with the witness and could go on forever.

Mr. Gertz: Your Honor, I would like to submit this: The witness testified, and I think this is a fair statement of his testimony, that when he first read those sixty-six quotes he was amazed by the similarity. Then he read, among other things, Defendant's Exhibit 4 of May 16, 1955, and changed his mind. We are therefore—and he testified to other things about that exhibit—we are therefore on that basis entitled to question him about the document which caused him to change his mind from
2239 his original conclusion about the similarities.

The Witness: I don't think that that is correct.

Mr. Gertz: Your counsel—

Mr. Martineau: I will assert that it is not, it is an

incomplete statement. He testified that one of the things that caused him to change his mind, as I recall it, was reading the whole context of both works.

The Witness: Precisely.

Mr. Gertz: He has never read both works, he has testified.

The Witness: By both—

Mr. Gertz: Q. You testified that you never read "In the Shadow of Lincoln's Death"?

A. That I never read?

Q. Did you not testify that you only read a portion of "In the Shadow of Lincoln's Death"?

A. What was the preceding statement you made, that I had testified I had never read the "Shadow"?

Q. You said you read only a portion of "In the Shadow of Lincoln's Death" to this very moment.

A. That I have read portions closely, that I have looked through the entire book.

Q. But you had not read "In the Shadow of 2240 Lincoln's Death" from beginning to end?

A. Well—

Q. Will you answer that?

A. I believe the question is equivocal.

Q. Will you answer that—

A. Have I read

Q. Have you read "In the Shadow"—

A. "In the Shadow of Lincoln's Death" in its entirety and closely, no.

Q. All right. Now that you have answered.

Mr. Martineau: Have you read the parts you claimed to be infringed—

The Witness: Relevant?

Mr. Martineau: —in this case?

The Witness: Yes.

The Master: All right, that is all we are interested in.

* * * * *

2259 Mr. Martineau: That as to any statements made in this exhibit, as to any reference or purported pertinence of the excerpt to parts of Dr. Eisenschiml's affidavit, as to those, if there are any errors, I don't see how this witness would know anything about it, and if there are any errors we will very frankly admit them because they are just errors of—

Mr. Gertz: Let's see if I could state it this way. I am not eager to prolong any part of the examination if we can help it.

Mr. Martineau: It will save your time and ours.

Mr. Gertz: Let's see if we can state it this way, then. We will make this offer as to certain of these things and subject to verification by you we will agree that the following excerpts included in Defendant's Exhibit 4 of
2260 May 16, 1955, have no relevance to plaintiff's affidavit paragraphs 20-B or 20-I.

Mr. Martineau: Subject to checking by us.

Mr. Gertz: Subject to verification.

Mr. Martineau: Good. That will probably save a lot of time.

Mr. Gertz: All right. When we come to more of them we will do the same.

* * * * *

2262 Mr. Martineau: On the record.

As I said today, and amplifying on it, you will recall, your Honor, when we brought all those books in at one of our hearings to read into the record just as authorities it was suggested by Mr. Gertz, I think, very wisely, that it would save everybody's time and save record if we would prepare excerpts from them and just put them in.

Now, apparently, the person that was directed to prepare the excerpts has assumed to exercise some legal judgments in these legends down below and draws inferences that are only proper for lawyers to draw.

* * * * * *

2263 Mr. Gertz: He based his judgment in part about it and we are entitled to examine on it.

Mr. Martineau: Let's bring it out.

Did you do that, Doctor?

2264 The Witness: To that I would say no, and I think I made clear that my judgment was made even before I saw the affidavit, and it was a steady process. I think, if I recall what I testified to, that when I became interested here I saw corroboration—

Mr. Gertz: In this book?

The Witness: In this book, further information of what I already discovered by reading Bryan, by looking at J. Monaghan and by other sources because after I had furnished the opinion then my interest was aroused, and I felt I ought to inform myself, even in a preliminary way.

Mr. Martineau: All I wanted to bring out as part of my admission was this: When you did read this Defendant's Exhibit 4, Dr. Samuels, after reading it, didn't you check it down and see whether or not in your judgment the thing was a source for these different quotes as appear on that bottom of the page?

The Witness: I think what I testified to was that I felt—my impression was, and I did not keep a careful note, that some were relevant and some I did not see the immediate relevance, and you have brought out that in some of these cases some of them were not relevant.

* * * * * *

2265 The Witness: No, if I may add, your Honor, my judgment as to the original question of the plagiar-

ism, the two taken as a whole, was formed prior to this because I got this, as I said, shortly before, I believe—I was then ill—and did not have an opportunity for any close examination, as a matter of fact, until very, very recently.

• • • • •

Mr. Gertz: Yes. I think we can safely admit, Jack, that the excerpt from Clara Langhlin which we have just directed the witness' attention to has nothing to do with quote 26.

• • • • •

Mr. Martineau: Well, certainly. It is an obvious
2266 error. There is no question about that.

Mr. Gertz: It may be just a typographical error or something else, but it has no relevance.

• • • • •

2269 Mr. Martineau: Elmer, I was going to say, would it shorten this or assist you in any way if we were to withdraw, in effect, from this exhibit either by
2270 a statement or physical deletion any claim at this time of any connection between the purported exhibit and anything in Dr. Eisenschiml's affidavit?

• • • • •

2274 Mr. Martineau: Well, in that case then I guess I will just leave it in because I don't regard it as much importance either way.

Mr. Gertz: I just want to reserve my rights.

Mr. Martineau: It just amounts to a non-lawyer in our office, a research person, trying to practice law.

Mr. Gertz: Okay.

Now, that disposes of the paragraphs of the affidavit. What about the quotes? Shall we go on with the quotes for a while, or do you want to think about that?

Mr. Martineau: I am perfectly willing to make
2275 the same stipulation with regard to the quotes be-
cause I don't think that that should be in there, in
this exhibit.

Mr. Gertz: All right. So it will be stipulated and agreed—well, you phrase it again so there won't be any question about it.

Mr. Martineau: All right. I would suggest that the legend in regard to the purported pertinence of the excerpts in Plaintiff's Exhibit 4 to either Eisenschiml or Millard, this legend on the bottom of each page, also amounts to a legal argument which should not have been placed in that exhibit, and I would suggest that it be disregarded, either physically deleted from the record or disregarded in substance, because that is an argument which we would make at the proper time and it shouldn't be made in an exhibit, I frankly confess.

Mr. Gertz: All right, and then subject, again, to my contention that factually the excerpts in question do not in fact have any relevance to the quotes to which we have referred, and subject also to my contention that costs and fees are to be charged by reason of the inclusion of the
said material we will consider this as having been
2276 withdrawn by you. Is that—

Mr. Martineau: Let's consider the statements having been withdrawn by us from this exhibit, and we also reserve the right to argue at the proper time, because that is what this amounts to, as an argument, to argue at the proper time whether they are or are not relevant.

May I include my apologies to the Court for having that material included? Believe me, it was done in good faith because we were trying to save everybody's time by collecting these historical excerpts in one book, and not lug all those books around and read them into the record.

• • • • •

2283 Q. Stanton plays a large part in the Millard article, does he not?

A. No, he doesn't.

Q. All right, let's take that.

A. Not in the sense that I think I pointed out.

2284 Q. Wouldn't you say that the Millard article is quite definitely derived from the Eisenschiml book, the particular references I have given to you?

A. The question is a non sequitur. You have asked me to look at the photograph.

Q. Yes.

A. At the caption and the sentence "This request Stanton refused point-blank," and it doesn't follow at all, because the question is not answered.

Q. In other words, you don't think there is any relevancy or similarity?

A. At this point, no. The part that Stanton plays, I think I explained. His behavior was erratic, out of
2285 character. I believe he was one who acted out of character, and so he is simply an illustration of one of the elements in the plot of Millard's article. As a matter of fact, there are relatively few illusions to Stanton.

Q. In the Millard—

A. Relatively few in the development of the plot, whereas the references to Stanton are integral to the development of this argument.

Mr. Martineau: In what? You say "this argument."

The Witness: This argument in Dr. Eisenschiml's book. It is an overwhelming impression that one gets.

2286 Q. Look at the bottom of page 106, the bottom of
2287 column 1 on page 106, and the top of column 2 on the same page.

A. Yes.

Q. Aren't there a number of references to Stanton?

A. Yes, there are a number—

Q. Important ones?

A. No more important—as a matter of fact, I would judge them to be less important than the references to Booth. That is, in the part they play in the development of the theme.

Q. Aren't you simply saying that in the Millard story Booth is the most important character, Booth and Lincoln?

A. Booth and Lincoln, yes, I would say so.

Q. And would you also say the next most important character in the Millard article is Stanton?

A. No, I wouldn't say that.

. . . . . .

2288 Q. Can we state it this way: that irrespective of the precise role Stanton plays he plays an important role in the Millard article?

A. He plays a role. I would prefer to say he plays a role, and just as—

Q. You wouldn't add—

A. From the point of view of the organization of a narrative such as this—

Mr. Martineau: "This" being Millard?

The Witness: Yes, a narrative such as Millard's. There are many important persons.

Mr. Gertz: Q. All right.

A. Atzerodt is an important person; the occupants of the box are important, because this whole thing is a story.

Q. Yes. Now let's turn to page 37 of the Millard article in the February, 1953 issue.

A. Yes.

Q. Do you notice the underscored matters?

2289 A. Yes.

Q. Would you not say that as to that page both

quantitatively and qualitatively they represent a pretty substantial part of the page?

A. No. No, I must add, also, that the terms "quantitative" and "qualitative" have absolutely no meaning in literary analysis.

Q. Wouldn't you say that those underscored portions are important or colorful?

A. That they contribute to the—

Q. A good deal?

A. —narrative, but no, I would not say they contribute a good deal because the part they play are these details, they are illustrations of a very definite narrative principle that I suggested. One was with respect to the chaos, the confusion. You may recall one place, "the babble of contradiction." It is all that, because this, from the point of view of the writer, the whole slant is in one direction, that is, the occult significance, for example. Now, how many illustrations you need of the portentous, of the occult and the supernatural would be difficult to say.

* * * * *

2291 Q. All right, you choose a page of the article with underscoring. Tell me any page and we will question you on it. Go through the article and select a page with underscorings.

A. With underscorings?

Q. Yes.

A. And contrast it with a page without underscorings?

Q. No, you take a page with underscorings and then I will ask you some questions on that.

A. All right, page 111 falls before me.

Q. All right.

2292 A. It is underscored—

Q. Wait, I haven't asked you—

A. Column 1.

Q. The underscoring in column—

A. "The world knows when Lincoln died, but oddly no one knows the time when he was shot," and then it is underscored, "the time usually accepted is 10:13." Those are the underscored passages in that page.

Q. In other words, you selected a page where in one column—

A. I turned here. Now—

Q. I haven't asked you a question yet. You selected the page. You select— a page with that underscoring?

A. Yes.

Q. Now, did you select that page because that was the only underscoring?

A. No, because when you asked me I turned—

Mr. Martineau: You told him to take any page.

Mr. Gertz: Yes.

Mr. Reuben: Now he criticizes him for the page.

Mr. Gertz: I am not criticizing, I am asking a question about the page.

Q. Is it not a fact that you selected that page 2293 because you found only one underscoring on that page?

A. I don't think so.

Q. Now, state the reason you selected that page.

A. I believe it was accidental. I turned the page—

Q. Accidental? All right.

* * * * *

2294 Q. All right, that is the point I am driving at. Is it not a fact that in determining whether or not an author copies from another author it is not wholly a matter either of quantity or of quality so far as the number of words or the particular passage is, but of the importance to the work, the particular work, of passages or the whole thing?

A. I do not believe that is a correct statement.

Q. Am I correct in stating that you believe that either a thing is overall copied or it is not copied at all?

A. No, I don't think that is a correct statement of my position.

Q. Is it not possible for Millard to have copied, say, particular portions of Eisenschiml without having copied everything?

A. Would you repeat that?

Mr. Martineau: Elmer, could I make a suggestion? Could you use a variation? I think what is confusing him is the copying.

2295 Mr. Gertz: I mean, could you use some other verb besides "copying"? I think that is what is giving him pause.

The Witness: That is part of it, but there is an implication of a theory of literary plagiarism and of confusion of that with literary indebtedness that I think is very misleading, and that is why I was so scrupulous when I began to suggest what the correct theory is of approaching literary plagiarism, and with this approach we go at it backwards.

Mr. Gertz: Q. Is it not possible for a work to be overall original and yet in detail to be copied from another writer?

A. I believe we discussed—I have already testified and we gave some examples.

Q. Would you answer that question?

A. I think it would be possible, and speaking hypothetically, for a writer to use historical sources to get all his factual information, from one or more sources, and using that, using that raw material, so phrase it, so design it, so pattern it, so impose upon it his creative plan, that it is an entirely new work.

Q. Is it possible—

2296 A. So that no one is misled that this work is the same as that work.

Q. Do you believe that one writer has the right to appropriate the research or the work of another writer so long as he phrases it somewhat differently?

A. That would depend on circumstances. I would be glad to elaborate if you wish, because it is a complex moral and ethical question.

Q. All right.

A. I don't think I did answer yes or no. Did you want—

Q. Yes, would you answer the question? Do you remember the question or shall I repeat it.

A. I don't think it can be answered categorically because literary composition and literary publication takes place at so many levels and is destined for so many areas, and each one, I think, presents a separate ethical problem.

Mr. Martineau: By "areas," do you mean different readerships?

Mr. Gertz: One moment.

The Witness: Readerships, yes.

Mr. Gertz: Q. We are dealing now, are we not, with two works in the field of history, in this particular
2297 case Millard's work and Eisenschiml's work?

A. I don't think that is a correct description.

Q. We are dealing with two works, are we not?

A. We are dealing with two works.

Q. Both on the Lincoln assassination theme?

A. That is not a correct description, I believe, of Dr. Eisenschiml's work.

Q. Isn't "Why Was Lincoln Murdered?" devoted to the assassination theme?

A. "Why Was Lincoln Murdered?" the assassination theme is a large part of it, but the assassination, the part the assassination plays in the machinations of Stanton and his group, it seems to me, is the real heart of that

book. Now, in a loose sense one can say one is dealing with the assassination theme, but you have not really said anything informative until you have qualified it as I have.

2302 Q. Would you not say that since Millard in the published portion of his article referred to Eisenschiml in connection with a particular passage that he probably took other things from Eisenschiml to which he did not specifically refer?

A. That there are other indebtedness?

Q. To which he doesn't acknowledge in his article?

A. That are not specifically acknowledged?

2303 Q. Specifically or inferentially acknowledged by Millard?

A. Yes, that I think would be a reasonable probability; yes.

2306 Mr. Geriz: Okay.

Now, I would suggest this. I believe if I took a little time in going over the rest of my notes—I didn't realize that Jack was going to stipulate to so many things—I would be able to organize the rest of my questions in such a way that in, I think, a relatively short while we will be through with this witness. I think we would gain, in other words, by not taking another half hour but adjourning at this time and coming back the next time, and I will have organized all the rest of my questions, and I think that in one session I will be able to finish the witness.

2308 Tuesday, May 24, 1955,
10 o'clock a. m.

• • • • •

2318 Q. You just stated that Millard did not go to the university. How do you know? How do you know Millard did not go to the university?

Mr. Martineau: He read his deposition which I sent him over the week end.

Mr. Gertz: Jack, do you mind letting him answer?

Mr. Martineau: I mean, if you want the facts.

Mr. Gertz: I am questioning the witness, Jack. Do you think it is right for you to answer?

Mr. Martineau: I am sorry.

The Witness: I had been discussing—I have become very much interested in Mr. Millard, and hence Mr. Martineau sent me the transcript of the testimony.

Mr. Gertz: Q. The deposition taken in New York?

A. Yes.

2319 Q. The direct and the cross-examination?

A. The whole—the whole business.

Mr. Martineau: Elmer, to be accurate I sent him an abstract of the—

The Witness: Oh, yes.

Mr. Martineau: And I did it at my suggestion.

The Witness: Yes.

Mr. Gertz: Q. You were told a lot of other things about Millard prior to this week end also, were'nt you?

Mr. Martineau: Prior to this week end? You mean prior to now?

The Witness: Prior to this week end? You mean, did I know things about Millard prior to reading—

Mr. Gertz: Yes, you were told a good many things about Millard by Martineau?

A. I was told a number of things about Millard, yes.

Q. You were told that Millard had consulted with Dr. Eisenschiml, were you not?

A. I think I was told that Millard had visited—had had a friendly visit with Dr. Eisenschiml.

Q. Didn't you use the words that he had consulted with Dr. Eisenschiml?

2320 A. Perhaps I did, yes.

Q. And did you not express surprise when I said there had been no consultation?

A. Yes. Well, I wouldn't stand on the word because—

Q. All right.

A. —because Millard's own testimony, as I read it, would indicate the nature, and I presume Dr. Eisenschiml has also spoken on the nature of that, and whether the word "consulted" or "interviewed"—it seems to me the nature of the transaction speaks for itself and the characterizing word ought not to change the nature of the discussion.

* * * * *

2324 Q. And those are the ten words to which you have reference?

A. No—your use of the ten words, I take it, is in the sense that I intended. It is a rhetorical expression.

Q. Actually there were far more than ten of those passages?

A. No, no, I was about to say that now under your guidance I have seen—well, that "slid over," and "passed over" are not direct identity. The only one that struck me was the "coarse and violent"—what is it, "violent"—you remember, in Parker.

Q. "Profane, coarse and violent"?

A. Yes. Now, there it struck me out of the twenty-five thousand words or more in the entire article there, three words seemed to me to occur in the order that either—

2325 that is to say, there is a verbal echo and that is astonishing.

Q. And that is the only passage?

A. And that is astonishing. It was astonishing to me that that was the only place where it stood out and that you had called my attention—now, if you would call my attention to any other I think I would have recalled it.

Q. You don't recall any other passage?

A. I was impressed—certainly not in re-reading the article several times do I recall collocations where you had, say, fifteen or twenty words, a sentence, in exactly the same expression, exactly the same order.

Q. All right. Can we agree—

A. That is, the amount of that sort of thing is so insignificant that, as I say, your drawing my attention to it, well, that stuck in my recollection.

Q. Can we agree that the passages cited by you in your direct, the similar or paraphrastic phrases are far more than ten, that it is over forty words, in the very passages mentioned by you?

Mr. Martineau: You mean these two, Elmer, that you read first?

2326 Mr. Gertz: Those three on pages 1947 to 1948 and 1949.

Mr. Martineau: Do you have offhand which parallels they are so I can follow it?

Mr. Gertz: Quote 10 and quote 4.

Mr. Martineau: Quote 13.

Mr. Gertz: No, no, I am talking about his direct testimony.

Mr. Martineau: Okay, go ahead.

Mr. Gertz: Q. Now, as I understand, then, you now say that the only exact language you recall is about—

A. Is very small.

Q. All right.

A. Now, Mr. Gertz, I think it would be almost frivolous to try to put down the number of words. It is extremely small.

Q. All right.

A. With respect to—

Q. But you did characterize the number of words or state the number of words?

A. Using—

Q. On direct examination?

A. Yes, on direct examination I used it as a rhetorical expression for extremely small.

2327 Q. In other words, by rhetorical expression you mean it isn't to be taken as literally true?

A. As a literal count, as a literal count.

Q. Isn't that true of much of your testimony, that it is simply rhetorical?

Mr. Martineau: This is just argument. I object to that. That is just argument and it is insulting to the witness.

Mr. Gertz: All right.

The Master: Sustained.

Mr. Gertz: Q. Let's turn to quote 35.

Mr. Martineau: I think I will protest against browbeating the witness. We haven't had any of that heretofore, we have gotten along very nicely, and have gotten the facts, so let's not start that.

* * * * *

2330 Mr. Gertz: Q. Now, Doctor, don't you think it is a pretty significant parallel, this 35?

A. I think significant of—do I think that Millard took that sentence from Eisenschiml?

Q. Yes.

A. Either consciously or unconsciously?

Q. That is right.

A. According to my theory, I would say that it seems to me probable in that case.

Q. Yes, and the quote it is a certainty that he took from Dr. Eisenschiml?

2331 A. Well, that I am sure is not in dispute.

Mr. Martineau: If it will help you any we will concede that he did.

Mr. Gertz: And wouldn't you think it pretty significant that in so clear an instance he took it?

Mr. Martineau: I don't quite understand "significant."

The Witness: Significant of what?

Mr. Gertz: Q. Of his practice, of Millard's practice in connection with the article?

A. I would have to forget everything I know about the habits of scholars to say this is significant of an intention to plagiarize.

Mr. Martineau: Elmer, let me see if I understand you correctly. You mean from the proposition that Millard admittedly took this quote here in quote 35 from Dr. Eisenschiml you wish him to infer that he took his entire article from Dr. Eisenschiml or a substantial—

The Witness: Or a substantial—

Mr. Gertz: Q. —or other portions?

A. Or a substantial part? No. That he used Dr. Eisenschiml for other portions I believe was apparent to me,

and I believe that Mr. Millard acknowledged his 2332 indebtedness for materials, but the point that I make as one who has read these things in their entirety and tried to see what their bearing is, this is insignificant material.

* * * * *

2334 Q. But you relied on that exhibit, did you not?

A. I think I explained, your Honor, to what extent, what was the nature of my reliance on it, and I don't think I relied on it for — no, I didn't rely on it for the purposes—

Q. Did you or did you not rely on it?

A. No, your question draws me out, it seems to me, into some irrelevancies.

Q. All right.

A. I did not rely on it.

Q. If you said you did rely on it, you were then mistaken?

A. In a manner—I think you are implying—I am not clear what you mean. I do recall, and perhaps the transcript will show it, that I suggested that I went on to read, and there were materials there that I found illuminating as corroborating certain impressions I had made. Yes, I think that is about as far as I went.

Mr. Martineau: When you say you went on to read you mean in Exhibit 4?

The Witness: In Exhibit 4, yes.

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2337 Q. Let me ask this: Did you reach your conclusion on the assumption that Millard and Eisenschiml employed common sources?

A. I cannot answer that question directly or yes or no, because I reached my conclusion, as I think I pointed out both on direct examination and subsequently on cross-examination, in a rather complex manner, and that when I came to the question of the alleged parallels then I think I pointed out I confronted the literary, the scholarly point, is there a similarity? How can you account for these alleged similarities? And at that point the question of common source became of interest, but I think I pointed out that the question of common source is not controlling in the initial opinion that I gave.

Q. Doctor—

A. I believe that is a correct representation of what I testified.

* * * * *

2342 Q. Yes, quote No. 3.

A. Yes.

Q. All right. Will you read both the Millard and the Eisenschiml columns?

A. Quote 3?

Q. Yes.

A. Yes, I have done that a number of times.

Q. Did Millard use material in any way different from Eisenschiml?

Mr. Martineau: Now, as to this, we have been over this at great length before.

Mr. Gertz: We have not—

Mr. Martineau: On quote 3, all about the Whig Press and everything.

Mr. Gertz: We have not asked that question at any time. We have not asked that particular very important question at any time. If you will examine the transcript—

2343 The Witness: My recollection is that we went over this at least twice.

Mr. Gertz: Then I would like him to answer it again.

The Master: All right, then, answer it once more.

The Witness: Now, there is a crucial word that I need to understand.

Would you read the question?

Mr. Gertz: Will you read the question, Mr. Shapiro?

(Question read.)

Mr. Gertz: Q. In this particular quote?

A. I believe I pointed out before that the particular nature of his use, and that is that the material contained in Dr. Eisenschiml comprised at least two pages and that these with the skip marks then do not reveal, or do not indicate the true nature of this parallel, and as I think I pointed out, the true nature of thy parallel is that Millard has used Dr. Eisenschiml for historical source, and recalling my testimony, that there are a number of words there that will have to be identical, namely, like the names of the towns, the dates and so on, so in that respect,

2344 and in that respect only, is there a similarity.

Q. Doctor, I asked you a simple question, did Millard use this material in any way different from Eisenschiml?

A. Different in the way I have indicated.

Q. All right. Is not that particular detail or information and material given in No. 3 colorful and important in the Millard story?

Mr. Martineau: Just a minute. I am going to object to any further pursuit of this because I just find in my notes here where he has belabored this thing at great length. He has asked about the significance of it before, of quotes 1, 2 and 3, instances of premature publication.

Mr. Gertz: Okay, we will go to the next question, quote 7. We will go to the next quote, then. We have had a lot of questioning and it may be in one particular quote and my notes may be lacking. Let's turn to quote 7.

• • • • •

2347 Mr. Gertz: No, all of it, every bit of it.

The Witness: I think all I can say is that it would be probable, it would seem to be probable that the historical or factual information or some of it, at any rate, was borrowed from Dr. Eisenschiml.

Mr. Gertz: Of course I am glad to have the witness say that, but it isn't in response to the question. I asked him simply if he knew—

The Witness: No, you asked me if I know that Millard had—

Mr. Gertz: Q. Had admitted?

A. Had admitted?

Q. Yes.

A. I don't think I had direct knowledge of that.

Q. If you had known, would that have qualified in any way your opinion with respect to the writings?

Mr. Martineau: You mean—

The Witness: With respect to the—

Mr. Gertz: Q. The general—

A. With respect to the literary question of the borrowings?

Q. Yes.

A. Now, wait a minute, are you changing your
2348 question, Mr. Gertz?

Q. I am asking you another question. Doctor, will you please listen to my questions?

A. I am sorry—

The Master: Repeat that last question.

Mr. Martineau: This is a new one.

(Question read.)

Mr. Martineau: You mean as to his opinion, his general opinion that Millard's work was an independent literary creation?

Mr. Gertz: Yes.

The Witness: No.

* * * * *

2349 The Witness: Well, it seems to me I can express a reasonable opinion on this. That is, if the source of the facts of Dr. Eisenschiml, if the source of the facts of Dr. Eisenschiml, the handling of it, the literary handling of it is different.

* * * * *

2372 Q. You have never been an editor, have you, of either a learned or a popular magazine, have you?

A. I have been an editor.

Q. Of what publication?

A. I was—

Q. A fraternity publication, University of Chicago?

A. I was many years ago an editor of a fraternity publication.

Q. At the University of Chicago?

A. Yes. Well, no, it was a national quarterly.

Q. Other than that you had no editing experience?

A. Yes.

Q. All right.

A. I was—

Mr. Martineau: Does he mean yes, he—

The Witness: I was advisory editor for college and it was my unhappy task to read articles for scholarship
2373 submitted to that magazine. As you know, it is a combination scholarly and semi-popular, and so that I had to do a good deal of editorial consulting—oh, yes, and then I have done a considerable amount of editorial advising, well, for Henry Holt; I have read manuscripts for the University of Chicago Press, for Harvard Press; Prentice-Hall consulted me a number of times on all sorts of editorial questions.

Mr. Gertz: Q. Those related to the literary qualities and substantial contributions—

A. No, no, those related to all sorts. That is, with the Harvard Press, they were interested in scholarly documentation, authenticity, validity of scholarship, style.

Q. What did they want to know about documentation?

A. What I knew about—that is, how original, that is, was the book sufficiently of a new departure, did it have a sufficiently new slant to be worth publication? That was one of the many questions.

Q. I am referring to documentation. What did the Harvard Press want to know about documentation?

Mr. Martineau: You want to know all they wanted to know?

Mr. Gertz: Yes.

2374 Mr. Martineau: Tell him.

The Witness: I don't believe I was specifically asked about documentation.

Mr. Gertz: You just got through saying you were asked about documentation.

A. I understood what my assignment was, I hope,

from long experience, that they wanted me to check the manuscript in various ways, and one of the ways was, if I recall rightly, to see whether the man may have borrowed from me. I am sensitive on that point, too.

Q. You are sensitive?

A. Yes.

Q. But Eisenschiml shouldn't be sensitive?

A. No, no—

Mr. Martineau: Don't even answer that question.

The Witness: We are all sensitive, you know that.

Mr. Gertz: Q. That is the answer.

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2375 Mr. Gertz: Q. Would you think it likely, Doctor, that a writer would go to one work and see the partial text of a letter and copy the partial text from that work and then go to another work simply for the purpose of filling in the missing words if that other work has all of the words?

2376 A. It would depend upon what he was stuck on as a writer. I have done it myself.

* * * * *

2377 Mr. Gertz: Q. In other words, you don't want to say it because it might contradict your testimony, is that it?

A. Oh, no.

* * * * *

2380 Q. I still don't know what you are driving at. Point out the differences in the use of this material, the substance by Millard and Eisenschiml.

A. You are using the word "substance" in some sort of metaphysical sense.

Q. I am using it in the ordinary language spoken by ordinary truthful people.

A. The language that you are using implies that the analysis—the analysis and comparison of two literary

documents, complex, can be referred to—you say by the man in the street.

Q. Can you come down to earth on quote 16?

A. No, you cannot.

Q. You cannot come down to earth? All right, that is enough on this.

A. I can't do it as an expert.

Q. You don't want to come down to earth so we will go on to the next one.

Mr. Martineau: You asked him some questions that nobody could understand. You are the one that is up in the air.

Mr. Gertz: These questions are very simple.

2381 The Master: All right, go on to your next question.

Mr. Gertz: A man who is interested in telling the truth would find no difficulty—

Mr. Martineau: This man is interested in telling the truth.

Mr. Gertz: —would have no difficulty in pointing out substantial difference. He has evaded that question every time it is put to him.

The Witness: You asked a precise—

Mr. Gertz: There is no question before you.

The Witness: When it is precise I have to be technical.

Mr. Gertz: Q. All right, turn to quote 17.

* * * * *

2383 Mr. Gertz: Just substance, I am not talking about language.

The Witness: They both contain, it seems to me, substantially the same data.

Mr. Gertz: Q. Yes, and used in substantially the same way in the context of their respective pieces?

A. Well, one—yes, they are similar, they are similar in language. There is a similarity.

Q. Now, would you say—

Mr. Martineau: Did you say in language there?

The Witness: There is a similarity in language. That is, one—it is conceivable that "never questioned by news hungry reporters" is, shall we say, another way of stating what is the fact stated here. Why that other way is adopted is, of course, another question.

Mr. Martineau: I think his question was, is there a difference in substance?

Mr. Gertz: He has answered the question.

Mr. Martineau: No, he hasn't answered the question.

Mr. Gertz: I am questioning him, Jack.

Mr. Martineau: Yes, but if you are going to ask him a question and he doesn't answer it—

Mr. Gertz: I am satisfied with the answer.

* * * * *

2386 Q. Wouldn't you say it is also important in the context of both Millard's story and Eisenschiml's publication?

A. It is a significant part of the episode, but as to its importance in the whole article, that is another matter and you are not asking me as to that.

Q. Yes.

Mr. Martineau: Is that what you are concerned with, as to its importance in the whole article in each case?

That is what he is asking you.

The Witness: No, because in each case I have already testified as to my analysis of that.

* * * * *

2388 Q. In other words, even if he stated that he stole or pirated anything from Eisenschiml you think he oughtn't have said it, he oughtn't have admitted it?

A. No, that is not what—that is, what he did was to realize as it became apparent through the reading of that that he was not a lawyer, and he was not trained in the law,

and that all he was competent to talk about was the nature of his borrowing, and I felt that as soon as he got on that ground he very clearly stated what was the nature of his borrowing; it was a very sensible statement.

Mr. Martineau: That is, he pleaded guilty to a legal conclusion when he said he should have acknowledged it.

Mr. Gertz: Q. You would have evaded it better, wouldn't you?

Mr. Martineau: Let's not insult the witness.

The Witness: I shall not take offense.

* * * * *

2389 A. The statement by Millard. You mean as it is quoted here?

Q. Yes, with respect to the general question of derivation or copying.

A. I do not regard it as evidence that the article he wrote was copied or was a literary plagiarism.

Q. All right. Now, looking again at the material in quote 22 would you say that Millard and Eisenschiml make substantially the same use of the material?

A. No. In Millard, and this passage is, I think, quite clear, Millard here is first dramatizing the statement because it fits that rather swift narrative pace he has adopted. Moreover, he is underscoring the baffling, the mysterious element of it. That is, it is part of his peculiar use of it since he is a man interested in mystery. All his writing for True shows that.

Q. Have you read other writings of Millard for True?

A. Yes, part of the exhibits, the material that Mr. Martineau sent me over the week end, included "The Devil's Errand Boy," and that piece about Stidger.

2390 Q. But you hadn't seen those things at the time of your original opinion, had you?

A. No, no, that is right; and hence I was very much struck that—it almost seemed to me that if I didn't know

the authorship of those three articles I could conjecture that the same man had written the three because of these similarities.

• • • • •

2391 Mr. Gertz: Are you concluding that because two men have different styles of writing, one—

A. No, no.

Q. —cannot copy from the other?

A. No. No, that wouldn't be correct. No. The style is an important analytical element.

Mr. Martineau: Is it important in determining whether one piece is an independent literary creation?

The Witness: Well, yes.

• • • • •

Mr. Gertz: Q. Now, would you point out the significant differences between the use that Millard makes of the material in quote 22 and the use that Eisenschiml makes of it, other than stylistic or language differences?

• • • • •

2392 The Witness: It seems to me that at this point the stylistic differences are important because style includes many, many elements, that is, the style of language, the characteristic handling of the materials. For one thing, the language is, it seems to me, substantially different.

Mr. Gertz: Q. Doctor—

A. Now, the facts, the facts in the righthand column are about the same as the facts in the left-hand column—

Q. And the use is about the same?

A. The use is different.

Q. What is the use—

A. The use in the first column is part, as I say, of this pattern. It is directed toward this pattern of confusion, of chaos, of bafflement, and this contradiction, by the way, was really a perfect illustration for Millard's thesis.

Q. All right.

Mr. Martineau: You haven't finished. Now contrast that with Eisenschiml.

Mr. Gertz: The witness never finishes an answer.

2393 It is always used for a lecture.

Mr. Martineau: You interrupt him.

Mr. Gertz: I know, I want to cut some of that lecture out.

• • • • •

2395 Q. All right. Let's go on to quote 23. You look at it.

A. I have read it.

• • • • •

2397 Q. All right. Will you point out any differences between Millard's use of the material in quote 23 and Eisenschiml's use of it other than language and stylistic differences?

• • • • •

2398 The Witness: Yes, of Eisenschiml, and there is a similarity in the phrase, and this is one of those infinitesimal similarities: "Fletcher stated that he overheard;" "Fletcher said how he had heard passersby talking of the assessination." That is a different statement of it.

• • • • •

2400 The Witness: Well, there is a substantial different presentation, a different presentation because the purpose is different. That is, Dr. Eisenschiml gives the printed testimony and the photostat because, as a scholar, he wishes to document an entire episode, and I believe he was doing it for the first time, and so as a scholar he gives the whole thing in detail that a popularizer or a story writer would never wish to do.

Mr. Gertz: Q. Doesn't he also give that excerpt separately from the facsimile?

A. That may well be.

Q. Not well be, but isn't it the case on page 110?

A. Yes, it would appear so. That is, the difference, I take it, is not a material difference.

• • • • •

2405 Q. Do you think the material in 24 is colorful?

A. Mr. Millard has tried to make the data more exciting, he humanized, he dramatized it, and one can put one's fingers on the words.

Q. Yes. Now, it is interesting material, isn't it?

A. Within the context. I think one would have to say only within the context. Some things are intrinsically interesting when you have enough, but to say that this is in itself, taken by itself—it is a whole line of—

Q. In the context of the Millard article is this not interesting?

A. It is made interesting by Millard.

2406 Q. And is it made important also?

A. Again you are distorting the analysis. I would say this is a detail that is important in the episode involving Fletcher, and that the Fletcher episode has its importance as being one, an illustration of the pattern that Millard saw into which these materials could fall. Now in that sense it has its importance or its function. I think I used that word.

• • • • •

2410 Q. Now, will you turn to quote 26. Notice the language, "Gleason was flatly refused."

A. Yes.

• • • • •

2411 Q. Wouldn't that indicate to you that Millard got his material from Eisenschiml rather than the article itself?

A. I think the similarity of language would suggest

to me certainly preliminarily that he had had access to Eisenschiml's book.

Q. He couldn't have gotten that phrase from "The Magazine of History" article, could he?

A. No, not from the point of view of copying. No.

Q. So that wouldn't you say it is a fair statement that the probability is that he got the material, and in this instance, language, from Eisenschiml rather than the Gleason article itself?

A. It seems to me it is a verbal echo. Whether it was in the man's notes or not—it would put me—if I encountered that, if I was hunting for the source, I would certainly say, "Well, now, here is a clue," and I would want to pursue it, that this may well have been, even that there is some degree of probability that this was the source.

* * * * *

2413 Q. The words or phrase "his services"—let me repeat the question. Would you not say that upon comparing Gleason's article with quote 26 of Millard and Eisenschiml that the probability is that Millard derived from Eisenschiml and not from Gleason?

A. In the absence of any other proof or testi-
2414 mony—

Q. Yes.

A. I would say there is a degree of probability.

Q. Yes.

A. I would not say a high degree, but a degree of probability.

Q. Would you tell me what gives you the suggestion that there isn't a high degree of probability?

Mr. Martineau: Oh, please, Elmer.

Mr. Gertz: Well, he says—

Mr. Martineau: He said it was a probability. Let's not—

The Witness: The language and the arrangement is somewhat different. I would want to pursue that if I were as a scholar on the track of it rather than as a lawyer.

* * * * *

2418 Q. Yes, would it not indicate, however, that in
2419 addition to his indebtedness to Dr. Eisenschiml's quote 27 that he probably was indebted to him for his material in other quotes as well?

A. Taking this isolated passage, no, I think I have pointed out that there is only one proper way of looking at these isolated passages because you might multiply them to 77 or 107 out a few, several hundred or a thousand. That is, I see no pattern of theft. There is a pattern, if any, which would indicate the fact to which Mr. Millard has testified, of indebtedness to Dr. Eisenschiml for a considerable amount of material.

* * * * *

2424 Mr. Martineau: May I make a suggestion? The witness has testified all morning in response to a litany which is getting slightly boring that he did not read Millard's deposition and that he wasn't told it was in Millard's deposition before he gave his testimony on direct.

Mr. Gertz: I am not finding it boring. I am entitled to find out if he would have changed his—

Mr. Martineau: I am addressing the Court. My only suggestion at this time is, can you not spare us the repeating of that very dull litany, "Did you read this?" "Did you"—

Mr. Gertz: I object to its being characterized as dull. I regard it as very important.

Mr. Martineau: He has already testified fifty times—

Mr. Gertz: Then he will testify fifty more.

* * * * *

2425 Q. Yes, the material, not the style and not the language in 28—would you say that is colorful material?

A. In itself that characterization would be inappropriate.

Q. Would you say it is interesting or important in the context of Millard's article?

A. I would have to say to answer as I did with respect to the other details, that these also are details significant within the episode or subepisode of which they are a part, but their relevance to either Dr. Eisenschiml's entire work or to Mr. Millard's is an entirely different question upon which you have not touched.

I don't know, was that responsive?

* * * * *

2435 Q. Quote 34.

* * * * *

Q. Would you say that the material itself is interesting or important in the context of Millard's story?

* * * * *

2436 A. Any detail, if it is well used in the framework of a story is important. In that sense, yes.

Q. All right. It makes the article more readable, does it not, Millard's article more readable?

A. No, it helps make the article.

Q. All right. Now, turning to quote 34-A, would you say that the material in 34-A helps make the Millard article more readable?

Would you repeat that, Mr. Shapiro?

A. Yes, I was a little bit astonished that you have changed from "colorful" to "readable."

Q. Well, I wanted to change the phrase.

A. Because I am trying to testify, really, as carefully and as precisely as I can within some kind of expert and necessarily technical context, and if the question contains

words in one sense outside of that context, it becomes almost impossible for me to give you an intelligible answer as an expert.

Q. In other words, you can't give an answer.

A. As an expert, not as you have framed the question.

* * * * *

2437 Q. On quote 35 we have already asked you. Now will you turn to quote 39. Will you read that?

A. Yes, I have read that.

Q. All right. Do you regard it as significant that Millard only quotes Bates and Browning on the subject matter and in that order when the same quotation was used by Eisenschiml?

A. Its significance, as I see it, would be this: that the source for the quotations would appear to be, nothing else appearing in any other testimony—the source for this material would be in Dr. Eisenschiml.

* * * * *

2444 Q. All right. Now, would you regard 47 as enhancing the readability of the Millard article?

A. I would regard it as one of the details which has a part in the entire story, but is not—by no stretch of the imagination plays a key part, even taken together with the others.

Q. You would say it is important, no, even if it isn't the most important?

A. Then one begins to quibble, because I take it we are interested in the total problem of plagiarism.

* * * * *

2448 Q. "Otto Eisenschiml, probably the world's leading authority on the hysteries of the Lincoln assassination."

A. I would take that as a pretty handsome acknowledgment, and it seems to me it is as strong as the equally handsome acknowledgment in "The Devil's Errand Boy."

Mr. Martineau: Incidentally, Elmer, if it will assist you, I will concede that that is the only reference in
2449 that manuscript.

Mr. Gertz: Yes.

The Witness: But, that is more than one sometimes will find in a scholarly work.

Mr. Gertz: Q. In other words, sometimes it might be even less—

A. No, in a scholarly work sometimes all you get is in a bibliography simply to list the title of a book and you have to surmise whether there is an indebtedness.

Q. In other words, to you that is enough acknowledgment, that Millard, for example, took material from the O'Beirne papers?

A. That is enough acknowledgment—wait a minute. To me that acknowledgment to Dr. Eisenschiml would indicate that he was grateful for the historical material that Dr. Eisenschiml had assembled, and as a matter of fact, it is more than one will encounter in a popular magazine, and I have been hunting.

• • • • •

2450 Q. Wouldn't it be reasonable to conclude from both that Millard took very considerable chunks of the research of Dr. Eisenschiml?

A. I think it would be reasonable to conclude from my reading that one of the historical sources to which he is indebted is Dr. Eisenschiml, and it is one of the important ones, I would say.

Q. All right.

A. But it is only one of many because the rest of the article, it would seem to me about eighteen thousand words —this is a very rough estimate—derives from other sources.

Q. You reached that conclusion in spite of the fact that you actually haven't studied the field? You are not a Lincoln expert on the assassination?

A. I reached the conclusion from—because now I have before me, Mr. Gertz, really a wide variety of material.

Q. But it still hasn't made you a Lincoln assassi-
2451 nation expert?

A. I have begun to question, Mr. Gertz, whether there is such a thing as a Lincoln expert. You people are at each other's throats.

* * * * *

2453 Q. Dr. Samuels, as I understand, you regard yourself as a language expert or, let's say, an English language expert?

A. Well, I think it would be safer to say I regard myself as a literary expert, because that is an enormous field. Even the linguists now argue which one belongs in the field.

Q. All right. Wouldn't you say that a language or linguistic expert or a literary expert ought himself to be able to write with clarity and accuracy?

A. I think it would be desirable if he did, but they don't always.

* * * * *

2454 Mr. Gertz: Q. The next series of questions will be based upon "The Young Henry Adams" by Ernest Samuels. Do you have a copy of it here or will we use my copy?

A. No, it is some years since I looked at it. I hope I can write better than I did then. My reviews, I think, are improving in style.

Q. Let me read a sentence from the bottom of page 25 of that work:

"And Henry, no more than his father, would have seen no reason to question the explanation of the revolutions of 1848 as the disastrous consequences of the insane
2455 attempts of socialism and communism to reorganize society."

That is pretty awkward, isn't it?

A. No. Let me have that, Mr. Gertz.

Q. Yes.

A. I should like to say that with respect to the literary style that is in issue, rather than have the author testify I would like to quote Thomas Mann, who is also a very great writer—

Q. No, I am asking about these things, not about Thomas Mann.

A. He says a writer is not the best judge of his own work, but with respect to the style I think abler men than I have passed on it, possibly even than you, and the reviews, if you will check them, have commented on the rather superior quality of the style, and I hope to improve it. As a matter of fact, Professor Howard Mumford Jones sent me an unsolicited letter on that score that I have kept.

Q. Now, would you look at—

Mr. Martineau: May I ask a question? Is it claimed that this book infringes on anything that Dr. Eisenschiml wrote?

Mr. Gertz: No. The purpose of this testimony is to show that Dr. Samuels is not an expert on language 2456 or style.

The Witness: Now, Mr. Gertz, are you seriously urging—

Mr. Gertz: Yes, I am seriously urging—

The Witness: I am sorry, I wish you wouldn't because you—

Mr. Gertz: If time permitted I would show several hundred glaring errors in punctuation, in grammar and a lot of other things, and I am going to take you through some of them. It is painful, but I am going to do it.

The Witness: That is more than the editors of the Harvard University Press.

Mr. Gertz: They are not on trial here.

Mr. Martineau: That wouldn't bother Elmer.

The Master: He is the doctor.

Mr. Gertz: He is appearing here as an expert in language and style.

The Master: Well, ask your questions and then we will see.

Mr. Martineau: We are getting a bit nasty, aren't we?

The Witness: You are indicting the chairman of my department, Mr. Gertz, who particularly praised me
2457 on my style.

Mr. Gertz: Q. Now, look at page 61. You see the sentence, "'The silly things' were hardly serious blemishes and Henry was quite aware that his letters, however impromptu they were, were no ordinary compositions"?

A. Will you hand it to me?

Q. Those two words, "were", one right after the other like that? Isn't that rather clumsy and awkward?

A. Now, Mr. Gertz, I don't want to grow impatient, but the question shows a certain obtuseness to literary questions—

Q. Do you think it is good—

The Master: Wait, wait.

The Witness: —a certain obtuseness to literary questions that is really painful to me.

Mr. Gertz: Q. It is very painful to me for a man posing as a stylist to make errors like this.

• • • • •

2458 Mr. Gertz: Q. In other words, you regard it as good style to have the words "were, were" following each other in the same sentence?

• • • • •

2459 Q. You have been testifying about style and I am talking about style. Now, I call your attention to this sentence on page 17:

"The equivocal behavior of the government did not deter Garibaldi and he and his thousands went on to Palermo where they outwitted the garrison of more than twenty thousand Bourbon and mercenary troops and received the capitulation of Toledo on May 30, 1860."

A. Now, what do you want—

Q. Wouldn't you say that is a rather awkward sentence with all of those "ands" in it?

* * * * * *

2460 Q. All right. Now, will you turn to page 138, and particularly to the following sentence:

"The other high priests of his faith, Alexis de Tocqueville, ought not to have been a stranger to him. His grandfather, John Quincy Adams, had once known that friendly critic of democracy and his father had long before been familiar with his work."

A. And his father—

Q. Wouldn't you say that is a rather clumsy indefinite way of phrasing something, and nobody without extreme care could tell who the "hises" and the "hims" are?

A. A careless reader—a careless reader would have difficulty, I will agree with you.

Mr. Martineau: Is that the book you got the Guggenheim Award for?

Mr. Gertz: No.

The Witness: What was your answer?

Mr. Gertz: I said no. This came out in 1946, you mentioned.

2461 The Witness: Wait a minute. I think you misunderstood. It was on the basis of that, that was part of the evidence I had to submit, that I would deserve a Guggenheim Award to carry on the second volume.

Mr. Martineau: And you got the award?

The Witness: And I have a letter requesting, from the Harvard Press, that they wished to publish—that they

wanted to publish the second volume. It has become, I might further add, the standard authority in the field.

• • • • •

A. Is that heavily punctuated? Is that your question?

Q. Yes, overly punctuated and mis-punctuated?

• • • • •

2462 Mr. Gertz: Q. Will you explain the use of the comma after the word "voter" in sentence which I just read on page 287?

• • • • •

2464 Q. Now, will you explain the difference between the excerpt from page 22 where there were no commas separating the quote "however" and page 44 where there are two commas separating the "however"?

A. If this is the way it appeared in my manuscript, which I have since destroyed, that difference, if I might paraphrase, only God and I knew why there is a difference. Today only God knows.

Q. Let me point out and you can verify, I will give you some page numbers and you will find the particular sentences indicated.

• • • • •

2467 Q. And you have the "however" separated by two commas again.

A. That is right.

Q. Now, will you state the explanation for it? They are contradictory, aren't they?

A. No.

Q. I mean, to you—

A. As a matter of fact, if I am asked to go back 2468 in mind to the writing of that manuscript, which by the way, began in 1941, I cannot reconstruct that enormously difficult work.

Q. In other words, you don't know why there is an inconsistency?

• • • • •

Q. In other words, you don't want to plead guilty until you know more of the facts?

A. No.

Mr. Martineau: Plead guilty of common misuse? Is that a felony or a misdemeanor?

Mr. Gertz: In a language expert it is.

* * * * *

2470 Q. Is this not a fair statement of your book: that sometimes you used the past perfect where it should be used and sometimes where it should be used you don't use it, or shall I point out the specific instances?

A. That is a preposterous statement with respect to my book.

* * * * *

2471 Q. Isn't that a good example of where the past perfect should be used?

A. No.

Q. Now, let's turn to page 15, this sentence:

"His French profited from the early instruction which his father gave him for he stood within the highest quarter of the class."

Shouldn't that have read "His French profited from the early instruction which his father had given him for he stood within the highest quarter of the class"?

A. To a person trained in Latin grammer that
2472. might seem to be an inexitable place, but I try to write in American English.

* * * * *

2475 Q. Yes. Is it not true, in order to save time and you tell me if it is, that you are not consistent in your use of commas in those instances I have given—

* * * * *

2477 Q. In other words, it is a fair statement to say that you don't consistently use commas in your writing?

A. No, this is a fair statement: that there is no arbitrary rule about the use of commas such as you suggest. That, I believe, is an academically accurate statement.

• • • • •

2478 *Redirect Examination by Mr. Martineau.*

Mr. Martineau: I will try and be very brief.

Q. Dr. Samuels, how many learned reviews have there been of the book "The Young Henry Adams," just roughly?

A. Almost too many for me to estimate. When I visited the Harvard Press about eight months afterward I was shown a folder containing literally hundreds of reviews. Many of them were from popular magazines.

Q. I see. In other words, a large number of reviews?

A. Oh, there was an immense number of reviews.

Q. Until Mr. Gertz reviewed your book had anyone complained about your use of commas before?

A. No, this is the first.

Q. Or past perfect tenses or—

A. No, all I had heard up to this point had been praise of the style. I had begun to fancy myself as a stylist.

• • • • •

2480 Q. Mr. Gertz questioned you at some length on the alleged similarity of these sixty-six parallels. Did you notice any differences aside from the sixty-six parallels? Was there any other material which Millard had in his article that you noticed?

A. Well, looking at the fact, and I take it that the red marks in that edition indicate roughly material borrowed, whether as to data, historical data or as alleged borrowings of language or alleged paraphrase of language, that the proportion is relatively small, that is, out of the twenty-five thousand words, more or less, that I believe, roughly

again, that the alleged borrowed material would not exceed some five thousand words; that the greater part of the language and the greater part of the data used, the very greater part, certainly, of the language, is Millard's own, and was obtained from other sources, that is, it is obvious that this is a—it would appear to be obvious to me that this is a multiple source and the very line taken in the plaintiff's affidavit would seem to me to confirm it since

2481 the plaintiff has isolated only these sixty-six or sixty-seven passages, and has constantly directed my attention to them, and of course, sedulously avoided drawing or calling attention to the large mass of material about which he makes no allegations.

• • • • •

2482 A. No, the taking, and I am reluctant to take that criterion, but taking what seems to me the most misleading way, adopting the theory that seemed to underlie these questions, I would say even in that gross way the alleged borrowed material is not a substantial part, and certainly when viewed properly, applying a rational theory concerning the nature of this article, so that this material falls into its true perspective, how it is used, then we see that it does not bear materially upon the originality of the whole piece.

• • • • •

2483 Q. But did you count the number of the material claimed to have been pirated?

A. No, because I felt it would be misleading,—

Q. I see.

A. —to the Court to attempt to base my opinion on what was fundamentally irrelevant criteria.

Q. I see. In other words, that would be using the purely quantitative sense, would it?

A. Yes. It would be relevant as to inquiry into literary authorship and the source of his historisal data.

Q. Except for the passages brought out by Mr. Gertz, and I am not going to repeat your testimony, did you notice any other alleged identities of language, either Dr.
2484 Eisenschiml's and Mr. Millard's, or something that either one of them quoted or purported to quote except as Mr. Gertz brought it out?

Is my question clear?

A. I think so. No, I think Mr. Gertz squeezed all the juice out of the material.

Q. Okay.

A. Or to put it another way, he pointed it all up.

* * * * *

A. Certainly on the popular level, and if you turn to, say, Time magazine, for example, there will be a historical sketch that obviously required a good real of research, and as a matter of fact their masthead will have a list
2485 of fifty or sixty researchers, but never any acknowledgement that some writer had dug it up.

* * * * *

2487 Q. How would you characterize Millard's work?

A. Millard's work is some basic truth dressed up in the garb of fiction. I would like to add to that because—it was brohght ont, I believe, in cross-examination concerning the medium. That has troubled me, and I did a little research about True magazine.

* * * * *

2488 Q. Now, will you continue?

A. Yes. I was proud of a little piece of research I did about True magazine. That is, I wanted to satisfy myself as well as the Court—

Mr. Gertz: Is there a question before us?

Mr. Martineau: There was. You interrupted about the other.

Mr. Gertz: Yes.

The Witness: It was supplementing about the nature of the medium.

Mr. Gertz: Yes.

The Witness: To confirm what was my very strong
2489 impression about the fact that True magazine, however serious it may be to its audience, has no scholarly standing, I checked the "Reader's Guide and Indexed Periodicals." As you know, every child who does any research knows about that, and there are some 114 magazines, periodicals, indexed in there.

Mr. Martineau: Q. In the Reader's Guide?

A. In the Reader's Guide, including things like the Saturday Evening Post, Collier's and Good Housekeeping, and so on.

True is not, that is, the articles in True are lost to sight, and I had checked also the American—

Mr. Gertz: May I ask this: Is that not because True came into being years after that guide to periodical literature began being published?

The Witness: Oh, no, Mr. Gertz, as new magazines come out, if they are serious magazines, the contents to be taken seriously, then they are immediately added, and you can see in every annual volume at the beginning there is a list because those lists change. Sometimes a magazine dies. Then there is, of course, the more important list for scholars, "The International Index of Periodicals," and there, of course, it would not appear
at all. That indexes a much larger number of per-
2490 iodicals. That is, this publication—

Mr. Martineau: Q. True, you mean?

A. True is not a repository of history. It is, I think, what I correctly characterized it at the very outset.

Q. Did you check to see whether or not True magazine was included in "Writings on American History" in the library?

A. It is not. Yes. Dr. Eisenschiml's work is of course listed and in the 1937-38 volume there are three reviews listed.

Q. What is that? Will you briefly describe that "Writings on American History"?

A. It is "Writings on American History" published under the auspices of the American Historical Association, and it comes out annually. It doesn't come down to date. I think the most recent volume is probably 1949.

• • • • •

2492 A. I believe the fact is that no learned publication would take cognizance of True magazine.

• • • • •

2547 Mr. Martineau: The only thing that struck me about the very learned findings prepared by our proponent was that it reminds me of that story of the boy who went in the library and spoke to the librarian and said, "I have got to write a theme on penguins. Have you got anything on penguins?"

The librarian looked around and scurried around the library, and finally came out with a wholearmful of books on penguins, so the kid take them and goes home and a week or so later he brings this armful of books back; and the teacher said, "Well did you get your theme done?"

He said, "Yes, I did."

She said, "Were the books helpful?"

He said, "Yes, but they told me too much about penguins."

PLAINTIFF'S EXHIBIT 1.

(Plaintiff's Exhibit 1 is "Why Was Lincoln Murdered?" written by the plaintiff. Three copies of this exhibit in addition to the record copy have heretofore been filed with the Court. For the Court's additional convenience, there is hereafter set forth an abstract of the book in outline form.)

Chapter I. The Fourteenth of April.

(pp. 3-5.)

A description of the movements of some of the parties involved in the assassination on the day of its occurrence. Stanton' differences with Lincoln and the other members of his cabinet are emphasized.

Chapter II. Assassination.

(pp. 6-10.)

A reproduction of Stanton's dispatches reporting the death of Abraham Lincoln.

Chapter III: The Strange Career of John F. Parker.

(pp. 11-21.)

A complete narration of the career and delinquencies of the man who was selected to guard Lincoln the night he was assassinated. The Chapter emphasizes that although the guard was guilty of a number of acts of misfeasance during his tenure as a Washington policeman, he remained on the force as long as Stanton was in power (some three years after the assassination) and was not dismissed until a few weeks subsequent to the ouster of Stanton as Secretary of War.

CHAPTER IV: WHAT REALLY HAPPENED AT FORD'S THEATER.

(pp. 22-31.)

A recital of the events that transpired at Ford Theater the night of the assassination, together with a relating of the fact that the witnesses to the crime subsequently contradicted their stories. The chapter concludes with the suggestion that Stanton had the duty to protect the President and also the power and motive to suggest that the various witnesses involved should change their stories.

CHAPTER V. THE PRESIDENT IS REFUSED PROTECTION.

(pp. 32-39.)

This section reports that Lincoln requested the presence of a close associate of Stanton as the President's bodyguard for his visit to Ford Theater. His request was flatly refused by Stanton and the grounds for refusal are demonstrated to be non-existent. The chapter also calls attention to the fact that Stanton testified under oath that Lincoln did not visit the War Department on the day he was assassinated and that this testimony is untrue. Lincoln's request for the bodyguard was made during that visit.

CHAPTER VI: PREMONITIONS VS. SECRET SERVICE REPORTS.

(pp. 40-53.)

A detailed analysis demonstrating that the War Department, and thus Stanton, had foreknowledge of the existence of a plot to assassinate Lincoln. The chapter closes with the description of the safeguards to protect Lincoln taken on the night of the assassination and clearly suggests they were inadequate.

CHAPTER VII: GRANT SUDDENLY LEAVES WASHINGTON.

(pp. 54-64.)

General Grant accepted an invitation to accompany Lincoln to Ford Theater and then abruptly refused to do so. His reported motives for his refusal are questioned and it is indicated that had Grant attended the theater the assassination would not have occurred. It is clearly suggested that Grant's ultimate rejection of Lincoln's invitation and his immediate departure from Washington was by order of Stanton.

CHAPTER VIII: HOW THE NEWS OF THE TRAGEDY WAS HANDLED.

(pp. 65-90.)

Stanton who was in charge of all the country's media of communication did not notify the public of Booth's identity until long after the assassination had occurred. This delay permitted the assassins to gain a large start. The first reports of the tragedy did not even disclose Booth's identity. Finally the South was kept in ignorance of the murder for a considerable length of time. The chapter demonstrates that the name of the assassin was in the hands of Stanton long before any dispatches were sent and the suggestion is made that the news of the occurrence and Booth's identity were deliberately withheld.

CHAPTER IX: EVERY AVENUE OF ESCAPE BLOCKED—SAVE ONE.

(pp. 91-96.)

It is demonstrated that the only escape route of the assassin that Stanton failed to bar was the one that Booth was most likely to have used and actually did use.

CHAPTER X: THE MAN HUNT IS ON!
(pp. 97-106.)

A description of the search undertaken by Stanton's War Department in the area where Booth was actually hiding. The chapter suggests Booth's capture was delayed by clumsy activities of the War Department.

CHAPTER XI: JOHN FLETCHER TELLS HIS STORY.
(pp. 107-115.)

A narration of the activities on the night of the assassination of a livery stableman whose employer's horse had been taken by one of Booth's co-conspirators. It is pointed out that the stableman told conflicting stories as to the circumstances concerning the theft. The chapter closes by demonstrating that his testimony later given at the conspiracy trial was mutilated in the final published report of the trial. This final report was published under the supervision of Secretary of War Stanton.

CHAPTER XII: BAKER DIRECTS THE PURSUIT.
(pp. 116-129.)

A description of the actual pursuit of Booth. The facts presented disclose that the searching party which was closest to capturing Booth wired the information it had gathered to the War Department—and was immediately ordered to discontinue its then line of pursuit. Later it is suggested that an effort was made to obscure this fact and the reader is asked what motive Stanton had for so doing.

CHAPTER XIII: THE END OF THE TRAIL.
(pp. 130-152.)

This chapter describes how a search of the Maryland Peninsula was bungled by the War Department thus preventing an earlier capture of Booth and also gives an account of how Booth's diary was suppressed by the War Department and when found was mutilated. The suggestion is made that Stanton mutilated the diary. The chapter also indicates that General Lafayette Baker, a one-time close associate of Stanton, apparently had secret information as to Booth's whereabouts. When Baker later fell out with Stanton he implied publicly that Stanton was involved in the assassination conspiracy.

CHAPTER XIV: DEATH VISITS GARRETT'S FARM.
(pp. 153-161.)

Doubt is cast upon the identity of the body identified as Booth's, the true identity of the man firing the shot killing "Booth," and the reason Booth was not taken alive. A series of questions suggest that the soldiers involved in the incident might have been under orders to kill and thus silence. All those involved in the shooting were under Stanton's command.

CHAPTER XV: THE PLOTS AGAINST GRANT, STANTON AND JOHNSON.
(pp. 162-174.)

An analysis is made to demonstrate that neither Stanton, Grant nor Johnson were ever targets of the conspiracy and the entire scheme was aimed at eradicating the lives of President Lincoln and Secretary Seward, both of whom favored moderation toward the South. The assertion is

made that the only group who gained from the illusion that other high officials were threatened were the radical Republicans who would have been blamed if only pro-Southern officials were attacked. (Stanton was of course a radical Republican and one of the South's bitterest foes.)

Chapter XVI: Stanton Invents a Novel Torture.

(pp. 175-186.)

A description of the treatment of the conspirators by Stanton's War Department. Stanton ordered such confinement and garb of the prisoners as would prevent their communicating with any one. The suggestion is made that this silencing was deliberate.

Chapter XVII: Stanton's Inner Council.

(pp. 187-193.)

An analysis of Stanton's intimates and the tasks he assigned to them indicate they were placed where they could best aid him and his ambitions.

Chapter XVIII: The Odyssey of John Harrison Surratt.

(pp. 194-206.)

A narration of the War Department's conduct and attitude concerning the capture of one of Booth's co-conspirators who escaped to Canada. The evidence amassed suggests that the activities by Stanton's War Department were such as to discourage his capture. Ultimately, when he was caught and returned, precautions were taken to prevent him from communicating with others. An unsuccessful effort was made by Stanton's War Department to railroad him to prison.

CHAPTER XIX: THE CASE AGAINST JEFFERSON DAVIS.
(pp. 207-229.)

Stanton is charged with deliberately and improperly implicating Jefferson Davis and other Southern leaders in the assassination plot. The facts presented indicate the total lack of support for the accusation. However, it is pointed out that it served the purpose of diverting attention from conduct that might not easily be explained and also furthered the radical Republicans' plans to punish the South.

CHAPTER XX: THE SETTING FOR THE CONSPIRACY TRIAL.
(pp. 230-249.)

A description of the composition and conduct of the military commission selected by Stanton to judge the guilt or innocence of Booth's co-conspirators. The facts presented demonstrate the defendants' case was prejudged and that the judges picked by Stanton did not give a fair hearing.

CHAPTER XXI: THE PRISONERS AT THE BAR.
(pp. 250-269.)

A description of the defendants in the conspiracy trial together with a comment upon each's guilt or innocence. Particular attention is given to the complicity of one defendant, Dr. Samuel Mudd, and it is pointed out that he was completely innocent of the crime and a fair court or prosecution would have so found. The clear implication is that all of Stanton's appointees were ordered to convict.

CHAPTER XXII: THE WOMAN IN THE CASE.

(pp. 270-295.)

A recitation of the background and evidence against Mary Surratt, the only woman defendant in the assassination case. It is clearly demonstrated that her conviction and execution were without merit for the evidence against her was worthless. The chapter suggests that she was a chief target of the prosecution and that in later years, her death weighed on Stanton's conscience. The inference is drawn that she was convicted and executed solely because of a conspiracy in higher places.

CHAPTER XXIII: THE CONSPIRATORS WHO WENT FREE.

(pp. 296-307.)

A narration of the conduct of certain individuals who aided Booth and yet were set free. Contrast is made between their acts and those who were convicted by the War Department. It is pointed out that the dividing line was between those who knew Booth intimately and thus might have been in his confidence, and those with whom his contact was more casual. This chapter indicates that such a dividing line would be used if there was a "higher-up" in the government who feared betrayal by one of the conspirators and this explanation for the pattern of conviction is offered as a working hypothesis.

CHAPTER XXIV: NOT WANTED—VICTORY IN THE EAST.

(pp. 308-346.)

A demonstration that Stanton did not want to win the War until slavery was abolished together with a description of his intrigues against General McClellan and his appointment of incompetent generals.

CHAPTER XXV: NOT WANTED—VICTORY IN THE WEST.
(pp. 347-359.)

The undermining, libeling and obstructing of General Grant by General Halleck, a trusted intimate of Stanton.

CHAPTER XXVI: THE CASE AGAINST THE RADICALS.
(pp. 360-371.)

A demonstration that the radical Republicans profited more from Abraham Lincoln's death than any other group of persons in the country. Stanton, of course, was a radical Republican.

CHAPTER XXVII: THE CASE AGAINST JOHN WILKES BOOTH.
(pp. 372-380.)

An analysis of Booth's motives in killing Lincoln. The conclusion is drawn that most of the motives that have been suggested in the past do not make sense.

CHAPTER XXVIII: THE CASE AGAINST ANDREW JOHNSON.
(pp. 381-385.)

An examination of Johnson's relationship to Abraham Lincoln and his conduct prior to the assassination reveals there is little if any worthwhile evidence that he was involved in Lincoln's murder. Unfounded accusations against him were made, however, by Stanton's radical Republicans. It is also noted that at times Johnson was strangely subservient to Stanton.

CHAPTER XXIX: THE CASE AGAINST STANTON.
(pp. 396-436.)

Some of Stanton's conduct and character is presented to demonstrate that he profited greatly by the Lincoln death. The chapter closes with the presentation of a hypothetical indictment against him for his part in the assassination of Lincoln.

PLAINTIFF'S EXHIBIT 2.

(Plaintiff's Exhibit 2 is "In The Shadow of Lincoln's Death" written by the plaintiff. Three copies of this exhibit in addition to the record copy have heretofore been filed with the Court. For the Court's additional convenience, there is hereafter set forth an abstract of the book in outline form. Plaintiff claims only five of the fourteen chapters of this book were infringed and accordingly, only those five chapters have been abstracted or outlined. The remaining chapters are however noted and in the main the titles suggest the subject matter treated.)

CHAPTER I: LINCOLN HAD SOME NARROW ESCAPES.
(pp. 3-21.)

A recitation of the various unsuccessful plans and attempts to abduct Abraham Lincoln made prior to his assassination. The essay points out that the protection afforded Lincoln, and his concern over attempts to kidnap him, were both inadequate. A dissertation on the legalistic aspect of kidnapping the President in time of war is also presented.

CHAPTER II: VOX POPULI.

(pp. 25-30.)

A narration of various rumors concerning Lincoln's assassination that appeared prior and subsequent to its commission. The stories appearing prior to the crime were premature reports, while those reported subsequently concerned alleged appearances of Booth in various cities.

CHAPTER III: A BODY IS IDENTIFIED.

(pp. 33-50.)

(No claim made by plaintiff.)

CHAPTER IV: DID JOHN WILKES BOOTH ESCAPE?

(pp. 53-88.)

A scholarly dissertation on whether or not the individual shot by the War Department as John Wilkes Booth was really Booth. All the available evidence tending to prove or disprove the identity of the body is amassed and the essay concludes that those who believe the body in question was Booth's have the better case. The suggestion is made that the issue can only be settled if the body is exhumed.

CHAPTER V: MRS. SURRATT'S BOARDING HOUSE.

(pp. 91-109.)

Mrs. Mary Surratt, the only woman executed as a co-conspirator of Booth, operated a boarding house prior to h[illegible] arrest and conviction. This essay deals with the comings and goings in that house of various people involved directly or indirectly in the assassination story. The facts presented substantiate the thesis found in the earlier "WHY" book that Mrs. Surratt was totally innocent of any participation in the murder of Abraham Lincoln.

CHAPTER VI: WAS MRS. SURRATT TORTURED?
(pp. 113-124.)

(No claim made by plaintiff.)

CHAPTER VII: THE SILENCING OF MRS. SURRATT.
(pp. 127-147.)

(No claim made by plaintiff.)

CHAPTER VIII: BEHIND THE SCENES OF THE CONSPIRACY TRIAL.
(pp. 151-188.)

(No claim made by plaintiff.)

CHAPTER IX: STANTON'S REIGN OF TERROR.
(pp. 191-213.)

(No claim made by plaintiff.)

CHAPTER X: THE REAL STANTON.
(pp. 217-231.)

(No claim made by plaintiff.)

CHAPTER XI: THE QUEER ADVENTURES OF JOHN H. SURRATT.
(pp. 235-251.)

(No claim made by plaintiff.)

CHAPTER XII: STORM AROUND SURRATT.
(pp. 255-261.)

(No claim made by plaintiff.)

Chapter XIII: The Surratt Trial.
(pp. 265-348.)

(No claim made by plaintiff.)

Chapter XIV: Problems Solved and Unsolved.
(pp. 351-370.)

This essay deals with a miscellaneous and variegated number of unrelated questions that still surround the Lincoln mystery and suggests answers to some of the puzzles. The problems discussed are: the exact time Lincoln was shot; how far John Wilkes Booth jumped from the Presidential box to the stage; whether or not Stanton's door-bell was working the night of the assassination; the identity of a man posing as Lincoln during the course of an unsuccessful attempt to abduct the President; the failure of the War Department to keep Booth and his cabal under surveillance; the date that a handkerchief of one of the conspirators was lost and the hour the moon rose the night of Lincoln's assassination.

PLAINTIFF'S EXHIBIT 3.

(Plaintiff's Exhibit 3 is the February, 1953 issue of "True" magazine published by the defendant and containing the story "America's Greatest Unsolved Murder" by Joseph Millard. Three copies of this exhibit in addition to the record copy have heretofore been filed with the Court. For the Court's additional convenience, there is hereafter set forth an abstract of the story in outline form. Unlike Eisenschiml, Millard's story is not divided into chapters and, accordingly, the page references made are to the pages of "True".)

34 Lincoln's death which ominously occurred on Good Friday is still America's greatest unsolved murder mystery despite the fact that in the years since the assassination volumes have been written about it and it has been copiously studied. All the clues that have been unearthed and the suspects who were involved have only heightened the mystery.

36 With the exception of Lincoln's guard, a drunken, stupid bully, all of the individuals concerned with the tragedy performed crazy, unnatural and suspicious acts which leave unanswered questions. Foreshadowings of the event were manifested by a dream Lincoln had concerning his own death, by premature rumors of his assassination, and even by the weather. The actions of certain members of Lincoln's staff also portended tragedy. This aura of impending doom was not dissipated even by the celebrations over the North's success.

37 Additional descriptions of the premature rumors and mournings over Lincoln's death, together with a reference to the strange and fateful decisions that confronted Lincoln on Good Friday morning. For un-

known reasons, it was suddenly decided that the President would visit Ford's Theater that night. Lincoln decided to invite Grant to the theater and thus unwittingly produced one of the greatest mysteries of the whole affair. Lincoln's decision to visit Ford's produced feverish activity by the theater's management.

104 A description of the preparations taken at Ford's indicates that all of the actions at the theater that day were filled with strange and ominous meaning. Booth received mail there and read it on the theater steps, laughing. The various activities and the preparations of the theater's employees also contributed ironies of fate. Three obvious and ominous portents of the coming catastrophe were inexplicably overlooked.

105 Lincoln's behavior the day of the assassination had overtones of strangeness. He met his Cabinet and related a dream of his that always preceded an important event or disaster. Stanton is introduced and it is noted he had an unpleasant effect upon Lincoln, and reference is made to Stanton and the radical Republicans' hatred for the President's plans for the South. Mystery is found in the fact that many people were unable to procure seats at Ford's Theater, although there were many unoccupied boxes the night of the assassination.

Grant's sudden refusal of Lincoln's invitation to attend Ford's Theatre with him is described and there is now little possibility of explaining this weird behavior of the General. Lincoln also continued to stay out of character by now requesting a bodyguard, by briefing Johnson as though he knew he was grooming a successor, and by discouraging Mrs. Lincoln from inviting friends to accompany them on a carriage ride taken the day of the assassination.

106 Continued narration of the strange behavior of the Lincolns which indicates that both of them had premonitions of disaster. Lincoln predicted his assassination and apparently, in an attempt to avoid it, asked for a particular aid of Stanton to act as his bodyguard at Ford's Theater. The request was refused and it is demonstrated that the refusal was inexplicable.

The author then switches his attention to Booth. He gives a detailed description of Booth's background and portrays him as a handsome actor—insane, wild-eyed and heavy-drinking. His description is prefaced by noting that the generally accepted story of history's maddest murder case contains enormous gaps, puzzles and mysteries.

107 A narration of Booth's original, fantastic plot to kidnap Lincoln. It was a plan characteristic of a mind with Booth's tendencies. Booth's melodramatic plan to kidnap the President was aborted because members of his cabal, described in detail, were either afraid or regarded the plan as hare-brained. Most of these men were, however, mesmerized by Booth. Mrs. Surratt's implication in the crime was also a strange work of fate. John Surratt, her son, also ultimately contributed "one of the most baffling angles of the whole mystery."

108 A description of some of the movements of Booth on the day of the assassination and of Abraham Lincoln's evening moments, including his arrival at the theater and entry into his box. A narration of the past exploits of Parker, the policeman, assigned to guard Lincoln at Ford's indicates he was a useless drunk. The author also points out that Colonel Crook, one of Lincoln's devoted guards, was "bothered by a sense of impending evil."

109 A description of the occupants in Lincoln's theatre box and a recitation of movements that occurred in it prior to the actual assassination. It is pointed out that in this connection, the evidence running true to pattern presents nothing but unexplained mystery. There is doubt and wonder about the presence in the box of Lincoln's valet and a newspaper man who allegedly entered it to deliver a dispatch. Lincoln's valet adds to the mystery for he apparently permitted and joined with Lincoln's bodyguard in the latter's dereliction of his duty.

The author graphically relates Booth's arrival at Ford's Theater and his subsequent movements prior
110 to his actual commission of the crime; how he placed himself in position; and how he then shot Lincoln. Immediately after the crime (because this is "history's maddest murder case"), utter confusion takes over. The occupants of the box are unable to give accurate eye-witness accounts of the shooting and the theater audience gives contradictory stories as to what happened. In the midst of the bedlam, Booth limps off the stage and makes good his escape. Lincoln is examined by doctors and moved out of the theater into a private
111 home where he is awkwardly placed in a too small bed. Stanton enters upon the scene to assume charge. Lincoln died Saturday morning, precisely at the moment a cold rain began to fall. It is also noted that Lincoln was shot at 10:13 P. M., a number consistently associated with the unlucky.

Almost simultaneously with the shooting of Lincoln, an attempt was made to take Secretary Seward's life by Paine, one of Booth's band. Subsequently, the would-be assassin was arrested by a grim jest of fate and he began an inexorable march to the gallows, taking with him Mrs. Surratt.

The author then deals with the activities of Atzerodt, another of the conspirators. His activities smack of blundering terror, for prior to the assassination they were such as to provoke suspicion by even the most unsuspecting, and ended with his ultimate capture, which is described.

112 An analysis is made of certain items he left in his hotel room—the same hotel which also boasted Vice President Johnson as a lodger. It is concluded that the leaving of these articles presents a number of unanswered questions which the author opines "forms one of the most tantalizing pieces of the whole crazy puzzle."

A fateful decision and novel idea to decorate the Presidential box with a Treasury flag "unwittingly" upset the conspirator's plans and "may even have changed the course of American history" because it resulted in Booth's breaking a bone in his leg and thus the whole plan of escape was foiled. It is still not clear as to which bone Booth broke and this minor enigma heightens the general air of mystery created. The supernatural element is also heightened here by quoting Lincoln's stepmother who, when told of the tragedy, indicated she had premonitions of Lincoln's death.

113 The story then tells how Booth escaped from Washington on horseback and points out that his activities from then on are still a mystery. Two other individuals rode out of Washington over the same bridge Booth used on the night of the assassination. One was David Harold, a co-conspirator, and the other was John Fletcher, a stableman, whose employer's horse was stolen by Harold. The stableman's appearance was brief and fantastic. The author devotes some space to

his testimony later given at the trial of the conspirators. The testimony jibes with the whole pattern of the Lincoln case—as it is complete confusion.

114 The stableman's testimony conflicted with that of the guard at the bridge Booth crossed; it is false and may be even sheer fantasy, according to other external evidence. Further, in the published version of the conspiracy trial a part of the stableman's testimony was mysteriously omitted.

The story then takes up the inexplicable delay in pursuing Booth; also tells how Stanton delayed four hours before releasing notice of the assassination and
115 the identity of the assassin to the newspapers; the hiatus between the assassination and the report of its occurrence amounted to hours and in some instances days. Stanton is accused of errors and blunders of omission in this connection. A telegraphic blackout that occurred in Washington that night is a mystery and the failure to investigate it is a greater one.

The author then puts forth Carl Sandburg's explanation of Stanton's behavior; his enormous activities during the first hours after the murder are described *in extenso*.

116 The escape route taken by Booth is next dealt with, including his meeting with one John Lloyd and his medical treatment by Dr. Samuel Mudd, later convicted as one of the conspirators, although apparently innocent of wrongdoing. Some of the testimony of John Lloyd, principal witness against Mrs. Surratt, is reported and it is demonstrated that it was totally unreliable.

117 The various government agencies, as a result of the increase in the rewards for finding Booth begin competing with each other for the money offered.

The author then again turns to John Parker, Lincoln's negligent bodyguard, narrating his confused movements immediately after the assassination. For two years thereafter, Parker was not discharged and in fact both he and Stanton were dismissed at about the same time as if some mysterious protection had been withdrawn.

Booth received help from two Southerners, Samuel Cox and Thomas Jones, neither of whom were later punished. At this point, the War Department began to operate efficiently and also covered up its earlier blunders. Men Stanton could trust and manage were put in charge of the pursuit and some of the conspirators were very quickly caught. The narrative then turns to Booth's movements prior to his capture, his near capture through a comedy of errors, and the noting that there were a number of false trails and phantoms walking around the Maryland countryside.

118 The story then tells how Booth was guided to the Garrett farm where he was ultimately captured and killed. Three Confederate soldiers who brought him there were never punished or even brought to trial, and the author stands in wonderment at this "incomprehensible mystery". In the meantime, one of the searching parties found Booth's trail but upon reporting this to the War Department was ordered by Stanton to discontinue the pursuit. Immediately, Lafayette Baker proceeded to put in operation plans of his own, procuring a small force to carry on the chase. But like the others, he too went completely and confusingly out of character by turning the actual pursuit over to another.

The story then briefly recites the conventional tale

of Booth's death, casts doubt upon it and proceeds to give a different version. What the author calls "the crazy conversation"—the "baffling dialogue"—between Booth and the capturing patrol is set out and its mysterious nature is dwelt upon. The author concludes that Booth was really trying to find out whether or not the patrol was sent to help him escape.

119 The slaying of Booth dovetails into the perennial enigma as to whether it was really Booth who was killed. In this context, there is a description of the shooting of the supposed "Booth," which casts doubt upon the identity of the man who fired the bullet as well as upon the man who was slain. There is also a narration of the subsequent mysterious handling of "Booth's" body and the unsubstantiated rumors that Booth was still alive.

The story then gives a brief description of the War Department's treatment of those conspirators cap-
120 tured, their later trial, their conviction and their resulting incarceration or execution. The whole proceedings is branded as illegal and blame for the trial, conviction and inhuman punishment is placed equally upon the shoulders of President Johnson and the War Department. One conspirator, John Surratt, escaped abroad and Stanton made no effort to effectuate his capture. Ultimately, when he was captured, an attempt was made to convict him illegally.

The story ends on the eerie note that all of those involved in "history's maddest murder case" have felt its sinister impact upon their lives. Stanton was ignominiously dismissed and shortly thereafter died, perhaps by suicide. "But the Lincoln assassination case would never die, nor with its sinister and terrible influence over those whose lives it touched". Mrs.

Lincoln went insane; two other of the occupants in Lincoln's box had horribly tragic endings as did the man who claimed to have shot Booth. "Not one person involved in the toils of America's greatest unsolved murder was ever the same again." The author closes his tale by reference to the many questions left unanswered which "still occupy other men, who keep on digging, searching, sifting and theorizing, hoping to bring to light some of the darker mysteries that cluster around the assassination of Abraham Lincoln."

DEFENDANT'S EXHIBIT 2.

Reader's Comment Sheet for True Magazine.

True.

Report Due ..... Words 25,000
Query ..... Pix .....
Index .....
Title: History's Maddest Murder Case.
Author: Joseph Millard.
Address: Franklin Manor, Sarasota, Fla.
Mss Rec'd .....
Blanks Sent .....
Mss Cost $1850.00.
Pix Rec'd .....
Blanks Rec'd .....
Paid 106380—2/4/52
1/18

A booklengthener on the assassination of Abraham Lincoln, which begins by describing it as the greatest unsolved murder of all time. It would certainly seem to have been all of that. When you get down to the facts of the case, the only solid one appears to be that Lincoln definitely was shot to death in a box in Ford's Theater.

There is not much doubt—but there is some—that John Wilkes Booth was the man who shot him. There is a hell of a lot of doubt that Booth was ever caught. The whole case is so surrounded by peculiarities, uncharacteristic actions, lies, confusion and mystery that it is highly doubtful if the truth of it will ever really be known.

Joe Millard, a Lincoln nut from away back, got so wound up in writing this that he ran on to a length of some 40,000 words. With his permission I have cut it to about 25,000, holding more firmly to a narrative line than his enthusiasm allowed him to do. Sharpshooting through the manuscript can probably bring it down a little more, but this is one case where I wouldn't worry about a little over-length. It's a story I have never seen done before, and I think an exceptionally good one for us.

Yes. TJN

1/18/52 This is a wonderful story and it may well prove to be the only concise summary of the strange facts surrounding the assassination. Certainly, many of these facts and speculations have appeared here and there before in various texts, but I'm pretty sure they've never been drawn together so well or in such entertaining fashion before. With the thought in mind that we may have something here which is, in its concept, a "first" addition to the Lincoln Story, why not submit proofs to one or several noted Lincoln historians for their comments. A hunch tells me that we might get a response from at least one which would be useful as a boxed precede and if such were forthcoming, would add stature to the piece. TJN's cuts have not only taken this down to workable length—almost—but certainly speed the pace and strengthen the narrative. Even if what remains exceeds our usual limits on a booklengther, let's try not to cut much more.

Yes: CNB

A rarely good one. Well written and a great conversation-producer. And surely almost entirely new to most people.

Yes kwp

DEFENDANT'S EXHIBIT 9 ID.

Sample Millard Research Note.

From Stefan Lorant "Lincoln, His Life in Photographs".

B's diary—18 pages missing, prior to 14th.

Entry for Fri., April 21—"After being hunted like a dog through swamps, woods, and last night being chased by gunboats until I was forced to return, wet, cold, and starving, with every man's hand against me, I am here in deep despair. And why? For doing what Brutus was honoured for, what made Tell a hero. And yet I, for striking down a greater tyrant than they ever knew, am looked upon as a common cutthroat. My action was purer than either of theirs. One hoped to be great himself. The other had not only his country's but his own, wrongs to avenge. I hoped for no gain. I knew no private wrong. I struck for my country, and that alone. A * * * people ground beneath this tyranny and prayed for this end, and yet now behold the cold hands they extend to me. God *cannot* pardon me if I have done wrong; yet I cannot see any wrong, except in serving a degenerate people. The little, the very little, I left behind to clear my name, the Government will not allow to be printed. So ends all. For my country I have given up all that makes life sweet and holy—brought misery upon my family, and am sure there is no pardon in the heavens for me, since man condemns me so. I have only *heard* what has been done (except what I did myself), and it fills me with horror. God, try to forgive me and bless my mother. Tonight I will

once more try the river, with the intent to cross; though I have a greater desire and almost a mind to return to Washington, and in a measure clear my name, which I feel I can do. I do not repent the blow I struck. I may before my God, but not to man. I think I have done well, though I am abandoned, with the curse of Cain upon me, when, if the world knew my heart, *that one* blow would have made me great, though I did not desire greatness. Tonight I try to escape those bloodhounds once more. Who, who, can read his fate? God's will be done. I have too great a soul to die like a criminal. Oh, may He spare me that, and let me die bravely. I bless the entire world. Have never hated or wronged any one. This last was not a wrong, unless God deems it so, and it is with Him to damn or bless me. And for this brave boy with me, who often prays (yes, before and since) with a true and sincere heart, was it crime in him? If so, why can he pray the same? I do not wish to shed a drop of blood, but I must fight the course. 'Tis all that's left me.

Hanging. Sun glare, umbrella over Mrs. S. Two 2x4s. Bound arms behind, legs below knees, hoods. Left to right, facing gallows, we see Mrs. S., Paine, Herold, Atzerodt.

Supreme Court, U.S.
FILED
NOV 6 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 599

OTTO EISENSCHIML,
Petitioner,

vs.

FAWCETT PUBLICATIONS, INC.,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ELMER GERTZ AND IRWIN S. BASKES
120 South LaSalle Street
Chicago, Illinois
Attorneys for Petitioner.

The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No.

OTTO EISENSCHIML,
Petitioner,

vs.

FAWCETT PUBLICATIONS, INC.,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Otto Eisenschiml, petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case insofar as the judgment affirms the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS OF THE COURTS BELOW.

The Memorandum Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, entered April 26, 1956, and the judgment order of that court entered April 30, 1956, appear in full in the Record filed with and certified by the Clerk of the Court

of Appeals for the Seventh Circuit and transmitted herewith at pages 486 to 494 of the Record.

The opinion of the United States Court of Appeals for the Seventh Circuit (including the Dissenting Opinion of Judge Schnackenberg) is reported in 246 F. 2d 598 and is set forth in full on pages 1a to 13a of the Appendix to this petition.

The opinion of the Court of Appeals modified the District Court judgment by eliminating the provision therein requiring plaintiff to pay defendant's attorneys' fees. It limited the costs to be taxed against plaintiff incurred in the appellate court by reason of defendant's printing of unnecessary and repetitious matter in the appendix filed by defendant with its Brief in the Court of Appeals, in violation of the rules of that court. Otherwise, it affirmed the judgment of the District Court.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 17, 1957. A petition for rehearing filed by petitioner was denied on August 12, 1957, Judge Schnackenberg dissenting. The order denying rehearing is shown at page 14a of the Appendix to this petition.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. What is the meaning and intent of Rule 53(e)(2) of the Federal Rules of Civil Procedure—a rule never construed by the Supreme Court, and given grossly divergent construction in the several circuits?

2. Whether under the "clearly erroneous" doctrine of Rule 53(e)(2) of the Federal Rules of Civil Procedure,

an appellate court is bound by the conclusions and inferences drawn by the Master and District Judge from undisputed or palpably true evidentiary facts, or whether upon review an appellate court is free to draw its own conclusions from such facts.

3. Whether a court of appeals is bound under Rule 53(e)(2) of the Federal Rules of Civil Procedure by a finding of no substantial copying made by a Master and District Judge where defendant's own expert witness testified that out of the no more than 25,000 words contained in the alleged infringing article, "the borrowed material would not exceed some 5,000 words", 20% or more of the total, and where the Court of Appeals itself found numerous similarities, and where it found the writer's admissions of substantial copying and the appropriation of plaintiff's research.

4. Whether Rule 53(e)(2) precludes a searching review of an ultimate finding which is a determination of law and fact, where most of the evidence is documentary (including plaintiff's exhibit containing most of the basic evidence, admitted without objection and supported by an identical exhibit introduced by defendant).

5. What is or what constitutes fair use—a term never defined by the Supreme Court?

6. Whether a conclusion by the Master and District Judge that the use made by defendant of plaintiff's books was a fair use, is a finding of fact binding upon and not subject to review by an appellate court, or whether fair use is a mixed question of law and fact upon which an appellate court can pass judgment; or whether copying of copyrighted material can be a fair use if, admittedly, it was used in a non-scientific, non-artistic, popular article, which does not claim to advance science or the arts, and was written for strictly pecuniary gain.

7. Whether, after finding that the writer of the alleged infringing article "fully admitted that some of the material and ideas used by him in his article came from plaintiff's" books, an appellate court is still prevented from reversing the judgment of the District Court by reason of the "clearly erroneous" rule.

8. Whether the opinion of the Court of Appeals is inconsistent with and contrary to its own previous opinions and the decisions in other circuits.

9. Whether Section 8 of Article I of the Constitution of the United States, granting Congress the power "to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries", and the Copyright Laws of the United States (17 U.S.C.) are to be disregarded and thwarted to allow a writer for a popular magazine to copy thousands of words, at least 20% of his article, from serious historical works written and copyrighted by plaintiff after eighteen years of "agonizing research" (to use the words of defendant's counsel) and the expenditure of more than $20,000.00 in cash.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED.

1. Article I, Section 8, of the Constitution of the United States:

> "The Congress shall have the Power * * to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

2. Copyright Law of the United States (Title 17, U. S. Code, Secs. 1, 1a, 3, 101, 112, 116, 208, 209).

See pages 15a to 18a of Appendix to this Petition.

3. Rule 53(e)(2), Federal Rules of Civil Procedure:

"In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous. * *"

4. Supreme Court of the United States Rule 19-1(b).

STATEMENT OF THE CASE.

This is an action for damages and to enjoin infringement of plaintiff's copyrights in his two books "Why Was Lincoln Murdered?" (hereinafter usually referred to as *Why*) and "In the Shadow of Lincoln's Death" (hereinafter usually referred to as *Shadow*) by the book-length feature story "America's Greatest Unsolved Murder", written by Joseph Millard, which appeared in the February, 1953 issue of the magazine *True* published by defendant.

The evidence was heard by a Special Master in Chancery, who found the issues in favor of defendant. The District Court affirmed the Special Master's reports.

The Master's Report was written by him without considering nor having in his possession 15 of plaintiff's most important exhibits received in evidence. The Master in his Report states that he "examined the bulk" of the exhibits "during the hearing" and that he examined "appropriate portions of the transcript" dealing with "most of the exhibits".

The Court of Appeals found that "plaintiff's book 'Why Was Lincoln Murdered?' is a scholarly work extensively documented and foot-noted. It is a hard-covered book of five hundred three pages divided into twenty-nine chapters. It concerns the assassination of Abraham Lincoln, and a subsequent history of the persons involved. The hypothesis of the work is that Secretary of War Stanton

was implicated or at least had a guilty knowledge of the conspiracy."

At the bottom of the various pages of plaintiff's book *Why*, there are foot-note references to the original sources for statements made by the author in his book, such as manuscripts in public and private depositories, newspapers, periodicals, pamphlets, reports and books, some rare and difficult to get and scattered in various places throughout the country. Some of the foot-notes indicate that the originals are in the possession of plaintiff. These include the O'Beirne papers and various newspapers. Other foot-notes include acknowledgment to the copyright owners of the books used or those holding possession of the documents consulted.

The Court of Appeals found that "Plaintiff's second book 'In the Shadow of Lincoln's Death' is also a hard-covered book. It is four hundred fifteen pages in length and contains fourteen chapters. It is supplemented by extensive notations. One prominent reviewer described this book as a long foot-note to the earlier work 'Why Was Lincoln Murdered?'."

The latter book has fourteen chapters, acknowledgments, notes at the rear of the book and illustrations.

There are 66 Quotes referred to throughout the proceedings and marked accordingly in the two books and article as examples of copying. Later, other claimed parallels were also pointed out, bringing the total to about 140, in addition to the claimed over-all plagiarism and the appropriation of research — what defendant's counsel described as plaintiff's "agonizing research".

The work plaintiff did on *Why* took him about 18 years. He expended about $20,000.00 in cash. Some of the manuscripts, books, photostats, magazines and newspapers plaintiff had to acquire were expensive and rare and their acquisition required extensive correspondence and

research. For several years he paid wages to a secretary and assistants and to investigators in various cities from coast to coast.

Leading authorities on Abraham Lincoln, the Civil War and American history in general, such as Carl Sandburg, Dr. Paul M. Angle, Dr. Paul Buck, Dr. James G Randall and others, are in agreement that plaintiff is the outstanding authority on Abraham Lincoln's death and that his said two books "are packed with his own sensational discoveries", to quote Millard, the writer of the infringing article, himself.

Why is essentially different from all previous accounts of Lincoln's assassination in that the earlier books were conventional accounts largely in narrative form. They dealt with no mysteries, asked no questions, had no surmises or inferences, and were based on familiar factual material. *Why* reopens a supposedly closed chapter of Lincoln's death, as stipulated by defendant's counsel, by disclosing many new facts discovered by plaintiff, and dovetails them with known facts into a new and consistent pattern, which forms the main implied thesis—that the crime was not, as theretofore assumed, the deed of a half-crazed actor acting on his own behalf, but the result of a conspiracy in which high Washington officials were involved, possibly Secretary of War Stanton included.

Prior to the publication of plaintiff's *Why*, no suspicion on these various matters had been voiced by any historical writer.

Professor Paul Buck of Harvard, a Pulitzer-prize winner, wrote in the *Saturday Review of Literature*, March 27, 1937: "This is the most fascinating piece of historical detective work I have ever read. A book of

fiction half so baffling in denouement, and half so amazing in implication, would be classified as a phantasy. Yet this work is so serious in purpose, so honest in scholarship, and so completely documented, that it commands the utmost respect from the most meticulous student of history."

The main thesis of *Why* was then supplemented by plaintiff's second book, *Shadow*. In both books, unlike earlier Lincoln assassination books, questions are asked, inferences, surmises and conclusions reached. Plaintiff's books, while based upon sound scholarship and factual, are also full of mystery, suspense and excitement.

Certain of the more important parts claimed to have been plagiarized pertain to the life of John Parker, the Presidential guard, whose negligence was a contributing factor in the assassination of Lincoln. Plaintiff was the first and only person to publish the full story of Parker and the peculiar part he played in the tragedy. Plaintiff's work has been praised enthusiastically by Carl Sandburg and others as a highly original and important addition to the Lincoln story. He dug some of Parker's record from what are known as the O'Beirne private papers, which were in his exclusive possession. This included Mrs. Lincoln's letter to O'Beirne.

Millard had no access to this letter nor to the other O'Beirne papers at any time. They had never before been published, and their very existence was unknown to historians. The bulk of the Parker record was obtained, collected and arranged by plaintiff, after great effort and expense, from the files and statistical information of the Metropolitan Police Department of Washington, D. C., buried under an accumulation of unconnected files and records, dating from 1861 to 1933.

Millard admitted that he never examined any of the material at the Metropolitan Police Department of Washington.

The Court of Appeals found that "The Parker Story is an important part of Millard's article", found that he must have taken the story from plaintiff and not from Carl Sandburg as he claimed because there are parts of the story "used by Millard that were not used by Sandburg", and found that "This information came from plaintiff's books because Millard did not examine the original police records, and they had appeared in no other book or article prior to that time."

Neither Millard nor defendant ever asked or received permission to use any material from plaintiff's books. Nowhere in the published article is Eisenschiml credited or referred to. Defendant admitted that it should have credited Eisenschiml.

No effort of any kind was made by defendant prior to publication to check for possible copyright infringements in the article. The article was never submitted to any historical scholar or Lincoln authority, despite the recommendation of defendant's own editorial staff. No one checked on the sources and credits.

Following the publication of the February, 1953 issue of *True*, a number of persons, including students of Lincoln, called plaintiff's attention to the said publication, remarked upon the close similarities between it and plaintiff's two books, and asked plaintiff if the article was written by him under a pseudonym.

The Millard article constituted about 25% of the contents of the February, 1953 issue of *True* and was listed on the cover and in the table of contents as the main feature of that issue.

The February, 1953 issue of defendant's publication *True* was sold to the public at 25¢ per copy. There was a gross circulation of 1,898,285 copies, subject to returns, etc. The gross advertising revenue was $184,571.00 and the net was $156,865.85.

It was stipulated between the parties that the issues of damages and profits would be reserved until the Court shall have passed on the issues of infringement.

There is no issue as to defendant's access to the plaintiff's two books. Millard, the author of the article, admitted that he had read and was familiar with both books before writing the article, admitted he had read both books at least twice, and that *Why* was part of the preparation for his article.

Prior to filing his suit, plaintiff notified defendant of his claim that defendant had infringed his copyrights. Nevertheless, defendant continued to sell copies of the issue of *True* containing the Millard article.

Later defendant advertised this article again on the front cover of its issue of January, 1954 (Plaintiff's Exhibit 25), where facsimiles of the previous year's issues of *True* are displayed, with the infringing issue at the head of the page.

Millard testified by deposition only. As to his general attitude, his state of mind, and on the use of sources, he was asked, "* * * did you in many instances attempt to examine original sources?" To this he replied: "In all instances I attempted to. In many instances I was unable to without taking a lot of expensive trips to the places where that source material was." Such trips he did not take. He was asked with respect to matters that he thought were plaintiff's discoveries, if plaintiff was the first scholar to call them to his attention, and he replied: "That

is a fact." He was asked: "Did you understand at the time you wrote your article that you had the right to use any factual material found in copyrighted books without looking at original sources?", He answered: "I thought I had the right to." He thought, also, that he had the right to use any surmises or inferences. He was content to know that a source existed without actually examining it, and he was willing to take plaintiff's word without going to the source.

The Court of Appeals found that "In his testimony, Millard freely admitted that some of the material and ideas used by him in his article came from Plaintiff's *Why* or *Shadow*." The Court then listed several illustrations of Millard's answers in this regard, and indicated that there were others.

Millard was asked in direct examination by counsel for defendant: "Did you steal or pirate that from Dr. Eisenschiml?" To this question he replied, "I am rather afraid I did."

Millard's attention was called to a sentence consisting of 47 words, which had been deleted from, but which had been in, the manuscript as originally written and submitted by him to defendant for publication. Having copied that long sentence verbatim, word by word, from plaintiff's book *Why*, Millard admitted "That is a direct copy from Dr. Eisenschiml, of course, since I am quoting from him; not only the idea, but the language". He was quoting, but had no quotation marks and did not mention plaintiff there or elsewhere in the article.

Dr. Riddle, plaintiff's expert, himself a Lincoln authority and trained in the comparison of language, made a comparison of the language in the article with the language in plaintiff's two books, found passages in the

article identical with passages in plaintiff's books, marked on the margin of the article the points at which he observed similarity, and proceeded to underline instances of close similarity. On the basis of his study he found 85 instances of parallelism between the Millard article and the plaintiff's books. Of those 85 he found 13 in which there was identity of language of from 13 to 33 words. These he underlined in his copy of the Millard article. The 13 said instances of identical language are set forth on pages 140-141 of the Appendix filed with plaintiff's Brief in the Court of Appeals.

Dr. Riddle concluded that "the substance of the Millard article is derived from [the Eisenschiml books]".

There are 38 full or partial columns of text in the defendant's article. All but 4 of these 38 columns have parallels taken from Eisenschiml's books. 34 of the columns have between one and 10 plaintiff parallels, making over 136 parallels in all. 26 of the 38 columns have one or more of the 66 parallels, 30 of the 38 columns have one or more of the additional parallels, and 22 of the columns have parallels taken from the initial 66 as well as from the additional list.

In Millard's treatment of the characters in his article, he dealt with the same characters dealt with by the plaintiff and in the same fashion. When plaintiff quoted certain words from a letter or other source, Millard quoted exactly those particular words, and no others. When plaintiff omitted certain passages, for the sake of brevity or for any other reason, Millard made the same omissions.

When plaintiff underscored or emphasized, Millard did likewise. When plaintiff asked questions, or made comments, or drew inferences, Millard did the same, without variation.

Where plaintiff made an apparent mistake, Millard made it, too.

That the essence of plaintiff's books and defendant's article are the same is shown by the chapter by chapter, passage by passage, outline and analysis set forth in the record, in Plaintiff's Exhibit 20 and elsewhere.

Plaintiff offered in evidence, without objection by defendant, his Exhibit 7, containing much of the basic evidence establishing defendant's infringement of his copyrights, and defendant offered an identical document in evidence. Both were received in evidence by the master and then completely ignored by him.

Defendant's own expert witness, Dr. Samuels, testified that the borrowed material in the Millard article would not exceed 5,000 words. This would make the borrowing up to, according to him, 20% or more of the total article.

REASONS FOR GRANTING THE WRIT.

This case presents important questions of federal law involving the protection of every serious historian and biographer from unscrupulous or careless writers for popular and purely commercial magazines who can quickly copy and paraphrase into feature articles, for their own profit, the works of a historian who has spent a score of years in research and writing and thousands of dollars in wages and in the acquisition of original documents.

The decisions of the District Court and the Court of Appeals in this case, if allowed to stand, will destroy the very purpose of the Constitutional provision securing to authors the exclusive right to their writings. No serious historian's work will be safe from the piratical forays and pillages of those who, for profit, will not hesitate to appropriate another's effort and works. The useful

arts and sciences, the spread of knowledge itself, will be impaired irreparably and discouraged.

Rule 53(e)(2) of the Federal Rules of Civil Practice will have been so construed as to have turned a Master in Chancery into a court of last resort, depriving an appellate court of its right to draw its own inferences and conclusions which its findings reasonably induce from documentary or undisputed evidence.

In this case the bulk of the evidence is documentary and not in dispute. It consists principally of plaintiff's two books and defendant's magazine. Neither the master nor the District Judge observed the demeanor of the alleged infringer. He testified by deposition.

The master wrote his report without even having before him or in his possession 15 of plaintiff's important exhibits received in evidence and he ignored other evidence. By the master's own admissions in his report, his findings could not possibly be based on all the evidence. The sanction given by the Court of Appeals to the trial and to the master's report in this case requires the Supreme Court to exercise its power of supervision.

The alleged infringer, in varying statements, admitted copying. The Court of Appeals found that he must have appropriated the research to what it refers to as the "Parker story" and which it finds to be "an important part of Millard's article" and also cites many other portions.

The defendant's own expert witness testified that up to 5,000 words, 20% or more of the total article, were borrowed by Millard from plaintiff. Still, the appellate court held "there was not a sufficient amount of copying to amount to an infringement," after the master had somehow concluded that such amount of copying called "for

an application of the doctrine of *de minimus non curat lex.*"

The Court of Appeals, in its majority opinion, finds "that a number of extracts from plaintiff's works were used in Millard's article", cites the provisions of Rule 53(e)(2), yet decides that "we have concluded, that in view of the findings of the Master" * * and "of the District Court, that Millard did not substantially copy plaintiff's books".

In arriving at such conclusions, the opinion misconstrued the meaning, effect and intention of Rule 53(e)(2). In this case, there is no question but that Millard copied. That is an admitted and undisputed fact. Copying of up to 5,000 of the 25,000 words in Millard's article is shocking; Millard admitted copying; and the appellate court found that he copied.

The question here is, and before the Court of Appeals was, whether, as a matter of law, the nature and extent of the copying were substantial and actionable. The mere fact that the master and District Court found in the negative did not preclude the Court of Appeals from exercising its own judgment and making its own conclusions. But, that Court, because of its erroneous interpretation of the rule, having no Supreme Court decision as a guide, deemed itself bound by the conclusions of the Master.

It is important that certiorari be granted in this case:

A. In order that serious historians and biographers on one hand, and writers of material for commercial magazines on the other, be apprised by Supreme Court decision as to their respective rights, duties and liabilities towards each other;

B. In order that the publishing industry, generally, including writers, editors and publishers, have a guide

by way of Supreme Court decision, to determine what can and what cannot be borrowed from earlier writers;

C. In order that the publishing industry and writers generally, may be apprised by Supreme Court decision, as to the true meaning and implications of *fair use*, a term constantly used in the trade;

D. In order that the true meaning, purport and intent of the Rule 53(e)(2) of the Federal Rules of Civil Procedure be given expression by the Supreme Court and a guide created so that the *clearly erroneous* doctrine may have a fixed and definite meaning;

E. In order that the Supreme Court determine how much weight should be given to a master's findings made by a master who in his report admits that he did not examine all the exhibits and that he examined only appropriate portions of the transcript of the evidence; and in order that the Supreme Court may determine whether a Court of Appeals in holding itself bound by findings of such master has departed from the accepted and usual course of judicial proceedings.

The impact of the decision in this case has caused it to become the subject of discussion and review in a number of publications directed to the legal profession and to publishers and writers.

The importance of the issues in this case is demonstated by the fact that Publishers' Weekly, the American Book Trade Journal, the publishers' and writers' "Bible", has devoted two articles to the case, both written by Harriet F. Pilpel, a member of the law firm of Greenbaum, Wolff, and Ernst.

The first article (Vol. 171, No. 25, June 24, 1957) written before the Court of Appeals had filed its opinion, declares at page 53:

"In effect, this decision closes almost every possible claim for recovery by the historian except when his own original language is extensively used, or his organization of his material so closely paralleled that the defendant can rightly be called a 'copycat'."

The second article (Vol. 172, No. 9, August 26, 1957) states at page 33:

"There have been intimations that Dr. Eisenschiml now hopes to carry his claim to the United States Supreme Court. That Court has not recently spoken on the question of just what is plagiarism of factual material anyway, and a lot of us might be wiser—and safer—if it did. Research may not necessarily be 'plagiarism from two or more sources' as it has sometimes been defined, but there's just enough accuracy in the definition to leave a lot of us puzzled as to who can take how much copyrighted material for what purposes from where. It wouldn't be a bad idea for the Supreme Court to turn its attention to that."

The current edition of the American Bar Association Journal (October, 1957, Vol. 43, No. 10), in its "What's New in the Bar" section, deemed this case and the subject and issues involved worthy of publication, stating at page 939:

"In an unusual copyright infringement case the Court of Appeals for the Seventh Circuit, somewhat reluctantly and with one judge dissenting, has affirmed a special master's and district court's decision that two books written by a Lincoln-Civil War expert were not plagiarized by a free-lance magazine author's article in *True* magazine.

The plaintiff, Otto Eisenschiml, is a recognized authority, particularly in the specialized field of Lincoln's death, and his two books—*Why Was Lincoln Murdered?* and *In the Shadow of Lincoln's Death*—

have posited the hypothesis that Edwin M. Stanton was implicated in or at least had a guilty knowledge of the conspiracy to assassinate Lincoln. It was this theory that the magazine writer expounded in his article 'America's Greatest Unsolved Murder'.

The Court found the magazine article to contain character-treatments similar to Eisenschiml's and several paraphrases of his work. The magazine writer readily conceded that anyone writing of Lincoln's death would have to be familiar with the plaintiff's works; he admitted the similarities, to his chagrin, but he maintained that he had not copied.

While ideas are not protected by copyright, the Court declared, mode of expression and the association, arrangement and combination of ideas and thoughts and their form of expression may make a particular literary composition entitled to protection. It expressed sympathy with the plaintiff's contention that his work had been plagiarized, but it concluded that it could not hold that the master's and district court's conclusions to the contrary were clearly erroneous.

The dissenting judge thought the magazine article was a 'transparent and shocking piracy' and the master's findings were wrong.

(*Eisenschiml* v. *Fawcett Publications, Inc.*, United States Court of Appeals, Seventh Circuit, July 17, 1957, Duffy, J.)"

The Court of Appeals Misconstrued The Meaning, Purport And Intention of Rule 53(e)(2) Of The Federal Rules Of Civil Procedure.

The majority opinion of the Court of Appeals is based on the misapprehension that under Rule 53(e)(2) of the Federal Rules of Civil Procedure an appellate court is bound not only by the findings of fact but also by the inferences, deductions and conclusions put on such facts by the Master and District Court. That is not the law as repeatedly announced and applied in numerous cases.

Under the law, this rule does not operate to bind with finality the inferences and conclusions drawn by the master and District Court from its findings.

In this case about 90% of the evidence is documentary, and there is no question of credibility of witnesses, except insofar as the Court of Appeals questioned the credibility of Millard by finding that he had, contrary to his testimony, taken the Parker story and much more from plaintiff.

Millard's testimony was taken by deposition and his demeanor therefore was not observed by the master or District Court.

The documentary evidence consists principally of plaintiff's two books and defendant's magazine. In a case such as this, where the Court of Appeals, to arrive at a fair decision, would have to read or examine the depositions, the books and the magazine, and would necessarily have to do what the master and trial judge did or should have done, conclusions are to be drawn by the appellate court itself. Where the evidence is of such nature, the appellate court is just as capable as, if not more so, than the master or the District Court of making an independent examination of the record and drawing independent conclusions, deductions and inferences.

The Court of Appeals found that Millard was a plagiarist. It found that he pirated the whole of the Parker material,— material which it found to be "an important part of Millard's article." It found that he freely admitted copying. It gave a number of illustrations of Millard's answers admitting that he had copied. In connection with independent research, it found that "Millard did, to some extent, at least, use the material which resulted from plaintiff's research".

Nevertheless, despite such findings of copying and use of plaintiff's works by Millard, the majority of the Court of Appeals, obviously with reluctance, affirmed the master and District Court, Rule 53(e)(2) being its excuse.

The amazing admission of defendant's own expert witness that up to 5,000 words or the equivalent of 20% or more of the entire article of defendant was borrowed from plaintiff, is completely overlooked and not mentioned by the Court of Appeals, although argued in plaintiff-appellant's Brief filed in that Court.

The Court of Appeals rests its construction of the clearly erroneous doctrine on its own former opinion in *Ferroline Corp.* v. *General Aniline & Film Corp.*, 207 F. 2d 912 (C.C.A. 7th, 1953) and quotes from page 920 thereof to the effect that a master's findings of fact are binding on the trial court unless clearly erroneous, that the question in the appellate court is "the same as it was in the court below, whether, as a matter of law, the master's findings of fact were clearly erroneous" and that it cannot "refuse to recognize the findings 'merely because of a difference in personal persuasion * * or a dissatisfaction with the result reached'."

The Court, however, overlooked the fact that in the *Ferroline* case, it also said on page 920, as part of the above quotation, that the "court must respect the advantage enjoyed when he [the master] *saw* and *heard* the witnesses and was thus enabled to judge of their veracity and credibility". (Italics added).

That is not the situation here. The Master did not see nor hear the man charged with piracy. Millard's testimony was taken by deposition in New York out of the presence of the Master. The Master's conclusions as to Millard's testimony were gathered from that deposition

only, and the appellate court could and should have gathered, formed and rested on its own conclusions from that deposition.

And, the appellate court knew from the record and briefs before it that it was dealing with findings of a master who did not even bother to have 15 of plaintiff's admitted exhibits before him when he wrote his report. It knew it was concerned with findings of a master who (after plaintiff had objected to his original report) deemed it sufficient to state and did state in his "Final Report" that he "examined the *bulk*" of the exhibits "*during the hearing*" and that he examined "*appropriate* portions of the transcript" dealing with "*most* of the exhibits".

From such record and from such master's report, the Court of Appeals was bound to make its own deductions. A master who examined the *bulk* or *most* of the exhibits obviously did not examine all of them. A master who examined exhibits—those that he did examine—*during* a hearing, did so at the wrong time. A master who examined *appropriate* portions of the transcript did not examine all of it.

Such action or inaction by the master was a far departure from the accepted and usual course of judicial proceedings, and the sanctioning of such departure by the District Court and by the Court of Appeals calls for an exercise of the Supreme Court's power of supervision (Supreme Court Rule 19-1(b)).

The failure of the Court of Appeals, under such circumstances, to carefully and thoroughly search and review the record, and the acceptance by the Court of Appeals of this master's findings as being final and conclusive, is tantamount to an abdication of a judicial function.

The appellate court could and should have drawn its own ultimate inferences and conclusions from the entire record and from its own findings, irrespective of the conclusions drawn by this master and District Court. Certainly, the rules were never intended to limit the Court of Appeals by master's findings so made.

That inferences and conclusions of the master and trial court are not subject to the "clearly erroneous" rule (especially where made as in this case), but are matters upon which the reviewing court may exercise its independent judgment, is a principle firmly established. Facts *competently* found by the master should be taken as correct, but an appellate court is always free (and not bound as the Court of Appeals thought it was) to draw ultimate conclusions which the findings, especially its own findings, and its own precedents, reasonably induce, particularly where, as here, from the master's own actions and report *his findings could not be competent.*

The Court of Appeals having failed to do so, the Supreme Court should determine the weight to be given the report of a master who "has so far departed from the accepted and usual cause of judicial proceedings" (Supreme Court Rule 19-1(b)).

Judge Schnackenberg, in his strongly worded dissenting opinion, accusing Millard of "transparent and shocking piracy", correctly stated that "Even from those facts set forth in the majority opinion, it appears that the master and district court are clearly erroneous." (Citing Rule 53(e)(2)).

In the case of *Kuhn* v. *Princess Lida of Thurn and Taxis,* 119 F. 2d 704 (C.C.A. 3rd, 1941), the question was whether a finding by the trial court with respect to the reasonable compensation of an attorney for services ren-

dered was reviewable by the Court of Appeals without the restriction of the "clearly erroneous" provision as contained in Rule 52(a), the companion rule relating to findings in trials by the judge. Holding the rule inapplicable, the court stated, at pages 705-706, in language which since has been widely quoted:

> "The reason for the rule rests in large part upon the fact that the trial judge who hears the witnesses testify and observes their demeanor on the stand is better qualified to appraise the credibility of their testimony and to resolve the conflicts therein. * *
>
> "The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the court from its fact findings. And, so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. * * Where the evidentiary facts are not in conflict or dispute the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action."

The *Kuhn* case has been applied in a variety of fact situations. See *Ball* v. *Paramount Pictures, Inc.*, 169 F. 2nd 317 (C.C.A. 3rd, 1948); *In Re Kellett Aircraft Corp.*, 186 F. 2nd 197 (C.C.A. 3rd, 1950).

In the *Kellett* case the principle was again reviewed and the court said, at page 200:

> "We are, as appellees urge, normally required to accept such findings of fact of the master as are confirmed by the District Court, if these findings are not clearly erroneous. This requirement includes a duty to accept also such purely factual inferences as are drawn by the master. But this rule refers to questions involving issues of credibility of witnesses

> or disputes as to basic facts. [Citing cases] . . . So far as the disposition of this case requires us to draw legal conclusions or inferences from undisputed facts, the rule is not relevant. We are as capable as either the master or the District Court of making a determination from the record before us * * *."

The determination of the term "substantial copying" in copyright cases can fairly be compared with that of "likelihood of confusion" in unfair competition cases. Both are conclusions to be drawn from the facts. In unfair competition cases, likelihood of confusion is the type of ultimate conclusion or inference which is held to be freely reviewable on appeal.

In *La Touraine Coffee Co., Inc.* v. *Lorraine Coffee Co., Inc.*, 157 F. 2d 115 (C.C.A. 2nd, 1946), the Court below had dismissed the complaint. In reversing, the Court of Appeals reached its conclusion on the issue of likelihood of confusion stating, at page 117:

> "While the trial judge, emphasizing the dissimilarity in size of the two businesses, concluded otherwise, we are constrained to think it is [*i.e.*, that confusion is likely]. As the cases cited below show, this is a question reviewable on appeal."

Likewise, in *Best and Co., Inc.* v. *Miller*, 167 F. 2nd 374 (C.C.A. 2nd, 1948), the same issue was presented, and the Court stated at page 377:

> "The trial judge correctly ruled that unfair competition is a question of fact, and the test is 'whether the public is likely to be deceived'. Applying this test he found no unfair competition. Such a finding is not conclusive on an appellate court, if it takes a different view as to the likelihood of deception."

Here, too, the finding [of no copying] was not conclusive on the appellate court. It took a different view

and found copying and should not have considered itself helpless by reason of Rule 53(e)(2).

Lack of independent research.

Contrary to the finding of the master and District Court that Millard's work was based on independent research, the Court of Appeals repeatedly found and showed how Millard had availed himself of plaintiff's research instead of using original and common sources, but somehow still thought it was bound by Rule 53(e)(2) to follow the master's and District Court's conclusions.

The Court of Appeals found that although "a large portion of Millard's article resulted from his independent work * *** it also is apparent, as hereinbefore indicated, that a number of extracts from plaintiff's works were used in Millard's article". From that finding, however, that Court refused to conclude that this is a situation requiring it to draw its own inferences and reverse the District Court's judgment.

To determine the extent of Millard's use or lack of use of common sources to make his work of only three and one-half months an independent work, as contrasted with plaintiff's twenty years, we need merely refer to his own testimony. He testified that in some cases he did not go to original sources, and that particularly he refrained from so doing where plaintiff's material was concerned. He leaned so much on plaintiff that he would not think of doubting him. He was content to know that a source existed, without actually going to it.

By independent research, Millard could have secured some of the information contained in his article from common sources. He could have gone to the same sources as plaintiff did and could have done his research inde-

pendently, but he did not. He simply appropriated plaintiff's "agonizing research".

In *Toksvig* v. *Bruce Publishing Co.*, 181 F. 2d 664 (C.C.A. 7th, 1950), the court held that in determining whether the defendant infringed the copyright of plaintiff, the question is not whether the defendant *could* have obtained the same information by going to the same sources, but rather whether defendant did actually go to the same sources and do his own independent research. At page 667 the court said:

> "The question is not whether Hubbard could have obtained the same information by going to the same sources, but rather did she go to the same sources and do her own independent research? In other words, the test is whether the one charged with the infringement has made an independent production, or made a substantial and unfair use of the complainant's work. *Nutt* v. *National Institute, Inc.*, 2 Cir., 31 F. 2d, 236, 237."

Millard had to exercise his own industry and do his own research. *Universal Pictures Co.* v. *Harold Lloyd Corp.*, 162 F. 2d 354, (C.C.A. 9th, 1947).

The proposition is well stated in the old case of *Gray* v. *Russell*, 10 Fed. Cas. 1035 (U.S. Cir. Ct. Mass., 1839) at page 1038:

> "There is no foundation in law for the argument, that because the same sources of information are open to all persons, and by the exercise of their own industry and talents and skill, they could, from all these sources have produced a similar work, one party may at second hand, without any exercise of industry, talents or skill, borrow from another all the materials, which have been accumulated and combined together by him."

The Copyright Laws were adopted to prevent writers such as Millard from claiming that just because some of the materials in plaintiff's books, scattered as such materials may be, are historical and *can* be brought together like plaintiff did, that research becomes unnecessary.

> "What would become of the elaborate commentaries of modern scholars upon the classics, which, for the most part, consist of selections from the words and criticisms of various former authors, arranged in a new form, and combined together by new illustrations, intermixed by them? * * * What would become of the treatises in our own profession. * * Blackstone's Commentaries is but a compilation of the laws of England, drawn from authentic sources, open to the whole profession; and yet it was never dreamed, that it was not a work, which, in the highest sense, might be deemed an original work; * * combined together in a new form, and in a new plan and arrangement; * *." *Gray* v. *Russell*, 10 Fed. Cas. 1035, 1038. (U. S. Cir. Ct. Mass., 1839).

As stated in *Ball's Law of Copyright and Literary Property* (1944), at page 244:

> "The law permits anyone to work upon the same original materials as those examined and utilized by another, if he collects them directly from original sources common to all, but he cannot save himself the time, effort and expense of original research by evasively using those already collected and embodied in a new work by the skill, industry and expenditures of another.
>
> "In some cases the originality of the subject matter and the purpose for which the work is designed may admit of little or no originality in the literal or artistic sense; wherefore such originality as it may possess must rest almost entirely upon the extent to which the author has independently resorted to the

> common sources open to all, without relying for his materials upon other copyrighted works treating of the same subject in substantially the same way and for the identical purpose."

The law therefore does not allow anyone to "save himself the time, effort and expense of original research". The Court of Appeals of our circuit emphasized its agreement with this doctrine in the *Toksvig* case by stating that "it is clear that Hubbard obtained much of value from the use in her work of many of the original concepts and ideas of plaintiff", and "was enabled to finish her book in less than one-third of the time that it took plaintiff". Yet in our case both of these factors were completely overlooked.

Millard wrote and defendant published an article that was neither original nor independent. The article being based on plaintiff's research, not Millard's, is pirated from plaintiff's copyrighted two books. "A number of extracts from plaintiff's works were used in Millard's article" and all of the Parker story, "an important part of Millard's article", were taken by Millard from plaintiff, but the Court of Appeals, erroneously believing itself limited under Rule 53(e)(2), reluctantly refused to reverse.

Millard appropriated the novel concepts, ideas, surmises, discoveries and interpretations of plaintiff's two books, and pirated their pattern and arrangement.

Millard's article follows the pattern and arrangement of and parallels the plaintiff's works. Without appropriating plaintiff's ideas and suppositions and architecture, style and design, that article would have been no more than any one of the numerous orthodox stories concerning Lincoln's assassination. Only by taking plaintiff's discoveries and

accepting the mysteries created by plaintiff, did Millard put together and have published "America's Greatest Unsolved Murder" as the leading article in defendant's magazine *True*. Defendant's own editor emphasized that the unexplained mysteries made the article sell.

It is these discoveries, mysteries, and literary composition that are the heart of plaintiff's books. Without them plaintiff would have had just another book dealing with the assassination. These are the things of value in the books, the things that made them saleable and valuable, the things that gave them distinct individuality, and it is these things of value that Millard appropriated, and that gave his article a degree of quality.

> "The question of infringement of copyright is not one of quantity but of *quality* and *value*." (Italics added)
>
> *Toksvig* v. *Bruce Publishing Co.*, 181 F. 2d 664 (C.C.A. 7th, 1950).
>
> *Ball, Law of Copyright and Literary Property*, (1944), page 335.

The master and District Court found that plaintiff's ideas and theories were historical facts which Millard could use. We do not contend that bare facts, news, theories or opinion, however original they may be, are covered by copyright, but we do contend, and the courts hold, that the association, arrangement, and combination of ideas and thoughts and their form of expression make a particular literary composition, the appropriation and use of which in such form, arrangement and combination constitute an infringement.

> *Holmes* v. *Hurst*, 174 U.S. 82, 49 L. Ed. 904 (1899).
>
> *Chicago Record-Herald Co.* v. *Tribune Assn.*, 275 F. 797 (C.C.A. 7th, 1921).

Although bare historical facts in the public domain are not copyrightable, the arrangement and treatment given the facts are copyrightable. Plaintiff's discoveries, and the arrangement given these facts by plaintiff were entirely novel, based on his own novel concepts. These concepts were appropriated by Millard.

Chicago Record-Herald Co. v. *Tribune Assn.*, 275 F. 797 (C.C.A. 7th, 1921).

International Film Service Co. v. *Affiliated Distributors*, 283 F. 229 (D.C., S.D. N.Y., 1922).

In *Chicago Record-Herald Co.* v. *Tribune Association*, 275 F. 797 (C.C.A. 7th 1921), the court said, at pages 798-799:

> "* * * in so far as the Edwards article involves authorship and literary quality and style, apart from the bare recital of the facts or statement of news, it is protected by the copyright law. * * *
>
> "This is plainly more than a mere chronicle of facts or news. It reveals a peculiar power of portrayal, and a felicity of wording and phrasing, well calculated to seize and hold the interest of the reader, which is quite beyond and apart from the mere setting forth of the facts. But if the whole of it were considered as stating news or facts, yet the arrangement and manner of statement plainly discloses a distinct literary flavor and individuality of expression peculiar to authorship, bringing the article clearly within the purview and protection of the Copyright Law."

Plaintiff's two books do not merely chronicle historical facts. The picture they portray and the words, phrases and manner in which they do so, make them interesting and entertaining reading in addition to merely setting forth facts. From the above quotation in the *Chicago*

Record-Herald case we submit, even if plaintiff's whole books were considered as stating historical facts, yet the arrangement and manner of statement and literary flavor and individuality of expression peculiar to authorship, bring the books within the protection afforded them by the Copyright Law.

The manner, form and expression of the treatment given the main characters, particularly Secretary Stanton, and the sequence of events are so alike in plaintiff's books and defendant's article that both portray similar emotions. Infringement is evident when the most important points of similarity between two stories indicate that the same use is made of the same series of events to excite the same emotions in the same sequence.

International Film Service Co. v. *Affiliated Distributors*, 283 Fed. 229 (D.C., S.D. N.Y. 1922).

In writing of the Lincoln assassination, Millard might have played up the assassin, Booth, or the victim, Lincoln, as other writers have done. We do not mean to infer that he could not write about or even implicate Stanton, but like plaintiff, he made Secretary Stanton the dominant and over-shadowing character in his article, in exactly the same and entirely novel manner as did plaintiff before him.

From the first page to the last there are continuous references to Stanton, all depicting him in the same dark light that plaintiff did, with the same incidents, epithets, tags of speech, innuendoes, questions, conversations and tell-tale language.

And what is true of Stanton is true of the other characters. The characterization of John F. Parker is copied from beginning to end. This the Court of Appeal found as a fact—built without the logical conclusion.

The Construction Given the Principle of Fair Use in this Case is Contrary to established Law and to Reason.

The Supreme Court ought now to define the term fair use. Fair use is an issue in almost all copyright infringement cases, but, unfortunately for sincere writers and fortunately for those who pirate their writings, the Supreme Court has never defined the term; and like fair-play in any business or sport, the term means different things to different men.

In this case although over 20 per cent of the whole article in question was taken, the taking up to this time still stands as one with *de minimus* standards with a fair use label.

Fair use is the usual excuse for copying, but the doctrine never applies when the defendant's publication, as here, is designed solely for monetary profit and commercial use. Because of the purely commercial nature of defendant's publication and the complete absence of any motivation remotely connected with the advancement of the arts or sciences, there could not possibly be a defense of fair use in this case. But, the Court of Appeals completely overlooked and misapprehended this principle of law.

Federal Judge Leon R. Yankwich, of the Southern District of California, in an article entitled "What is Fair Use?", published in the University of Chicago Law Review, Volume 22, No. 1, Autumn 1954, sums up the proposition briefly as follows, at page 209:

> "If * * * the appropriation * * * is motivated by the desire to derive commercial benefit, the use, regardless of quantity, is unfair." [Citing *Holt* v. *Liggett & Meyers,* 23 F. Supp. 302, (D.C., E.D. Pa., 1938)].

In *Loews, Inc.* v. *Columbia Broadcasting System,* 131 F. Supp. 165 (D.C., S.D. Cal., 1955) the Court adopted the above quotation and added, at page 176:

> "It was obviously made to point up the impact of commercialism on the doctrine of fair use. We would conclude that the *purpose for which the use was made* is of major importance * * * that broader scope will be permitted the doctrine where the field of learning is concerned and a much narrower scope where the taking is solely for commercial gain." (Italics added)

The Master correctly found that *True* "is a magazine for popular reader consumption" and that it is "rarely, if ever, cited or used for scholarly purposes * *."

A finding of fair use would necessarily be a *conclusion* deduced from the facts, and the Master concluded from the facts that Millard's use of plaintiff's works was *de minimus* and a fair one. The Court of Appeals, after first agreeing that "the question of a fair use usually arises in connection with scientific or other works dealing with a common subject matter" finds that the issue of fair use is one of fact, and that it is bound by the Master's findings in that regard. But, fair use is not a fact; it is something that must be deduced or inferred *from* the facts; it is a legal conclusion based upon the facts and more.

Here again the Court of Appeals misconstrued the meaning and intent of Rule 53(e)(2) and failed to recognize that since the Master's finding of fair use was a conclusion drawn by him from his findings of facts, it, the Court of Appeals, was completely free to draw and should have drawn such ultimate inferences and conclusions as in its opinion should be drawn in a case where over 20 per cent of the alleged infringing article was admittedly copied from plaintiff's books.

Broadening the concept of fair use so as to allow an article such as that herein involved to be published with the blessing of the courts is a dangerous precedent with limitless implications. The whole fabric of intellectual integrity may be destroyed thereby. Unless this court intervenes, defines fair use, and calls a halt to such outrageous literary theft, no serious writer is secure; not only plaintiff, but every historian and biographer and the public generally will suffer in the long run.

CONCLUSION.

The framers of the Constitution wisely gave protection to authors and inventors in order, as they stated, to promote the progress of science and the useful arts. This, as implemented by statute and the courts, has largely accounted for the vast technical and cultural advances of the United States. Those who labor day and night at great personal sacrifice, as plaintiff has done, to get the material for the creation of useful scholarly works are sustained by the foreknowledge that they may enjoy the fruits of their labor. When a publisher with vast economic resources for litigation is permitted, as here, to take away, through its hireling, the fruits of such labor, then a blow is struck against the spirit of honest endeavor. Why engage in "agonizing research" if any glib paraphraser can palm off as his own what you have created through the sweat of your brow?

By reversing the lower courts and by adjudicating that there has been an actionable infringement here, all writers of sober honest prose, and not alone plaintiff, will be assured that the Constitutional safeguards really prevail.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Chicago, Illinois
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APPENDIX.

(Majority Opinion)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11830 September, 1956 Term—April, 1957 Session

OTTO EISENSCHIML,
Plaintiff-Appellant,
v.
FAWCETT PUBLICATIONS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 17, 1957

Before DUFFY, *Chief Judge*, and FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. The complaint herein alleges copyright infringement. Count I alleges defendant infringed plaintiff's copyrighted book "Why Was Lincoln Murdered?" (hereinafter sometimes referred to as "Why"). The second Count alleged the defendant infringed plaintiff's copyrighted book "In the Shadow of Lincoln's Death" (hereinafter sometimes referred to as "Shadow"). Plaintiff seeks an accounting for profits, damages and costs pursuant to the Copyright Act.

The defendant, Fawcett Publications, Inc., publishes a magazine called "True". Plaintiff alleges defendant infringed his copyright by publishing in the February, 1953, issue of True, an article entitled "America's Greatest Unsolved Murder" written by one Joseph John Millard. The cause was referred to a Special Master, although the oral testimony of only five witnesses was heard by him. He also considered three depositions including that of Joseph Millard, and examined numerous exhibits.

The Special Master made a report recommending that the Court enter judgment for the defendant, and that the plaintiff be taxed all costs including the payment of an attorney fee. He reported that the parties had deposited with the Master the sum of three thousand dollars for fees, and he requested an additional allowance of three thousand dollars. Exceptions were filed to the report. The District Court filed a short memorandum, and entered an order overruling objections to the report, ordering the plaintiff to pay the Special Master an additional sum of Forty-five Hundred Dollars and to reimburse the defendant in the amount of Fifteen Hundred Dollars for the sum which it had deposited with the Special Master. The Court also ordered that the plaintiff pay attorney fees. The amounts allowed by the Court were Fifteen Hundred Dollars more than had been requested by the Special Master; however, the latter has filed a partial satisfaction to the extent of Fifteen Hundred Dollars.

Plaintiff has written a number of articles and books on the Civil War period. He is an acknowledged authority in the field of Civil War history and, in particular, in the narrower field of Lincoln's assassination. His research on this subject extended over a period of eighteen years, and plaintiff testified he expended $20,000.00 in doing this

work. Millard testified no competent authority would write about Lincoln's assassination without studying plaintiff's works.[1] Millard read plaintiff's "Why" and "Shadow" at least twice before writing his article.

Joseph Millard has been a free lance author and writer for twenty-five years. He has penned and sold over one thousand stories to popular media. He has made a study of the Civil War period, and has accumulated a Civil War library containing many books, magazines and newspapers. At the time of his deposition he produced more than a hundred books from his library. Prior to writing the alleged infringing article he had written, and defendant had published, two earlier articles concerning the Civil War. The first was published by True in December, 1945, and was entitled "The Spy Who Saved the Union." The story concerned the exploits of one Felix Stidger, a counter-espionage agent who had exposed the dangerous Copperhead Society called "Knights of the Golden Circle." The second was published in the July, 1947 issue of True, and was called "The Devil's Errand Boy." This story concerned incidents in the life of Lafayette Baker, who was head of the Secret Service during the Civil War, and who was a one-time intimate of Secretary of War Edwin M. Stanton.

Plaintiff's book "Why Was Lincoln Murdered?" is a scholarly work, extensively documented and foot-noted. It is a hard-covered book of five hundred three pages divided into twenty-nine chapters. It concerns the assassination of Abraham Lincoln, and a subsequent history

[1] In his article "The Devil's Errand Boy" Millard referred to plaintiff as follows: "Mr. Otto Eisenschiml of Chicago, the outstanding authority on Abraham Lincoln's death, has devoted a lifetime of intensive research to the subject. His two books—'Why Was Lincoln Murdered' and 'In The Shadow of Lincoln's Death'—are packed with his own sensational discoveries. Yet he feels the surface has barely been scratched."

of the persons involved. The hypothesis of the work is that Secretary of War Stanton was implicated or at least had a guilty knowledge of the conspiracy. Twenty-two thousand copies of this work were sold.

Plaintiff's second book "In the Shadow of Lincoln's Death" is also a hard-covered book. It is four hundred fifteen pages in length and contains fourteen chapters. It is supplemented by extensive notations. One prominent reviewer described this book as a long foot-note to the earlier work "Why Was Lincoln Murdered?" Thirty-six hundred copies of this work were sold.

Defendant's article "America's Greatest Unsolved Murder" contains about twenty thousand words. It was the longest article and the main feature of the February, 1953 issue of True. The author originally entitled it "History's Maddest Murder Case." It contained no footnotes, bibliography or other documentation.

Neither defendant nor Millard ever asked or received permission to use material from plaintiff's books. Nowhere in the published article is Eisenschiml credited or referred to. The only such passage in the article as written by Millard was "Otto Eisenschiml, probably the world's leading authority on the mysteries of Lincoln's assassination, has in one curt sentence treated Stanton's diatribe to the respect which it deserves * * *." However, this passage was deleted from Millard's manuscript by defendant before publication in its magazine.

Two expert witnesses testified and, as so often happens, held diametrically opposed views. Dr. Donald Riddle is the head of the division of Social Science at the University of Illinois, Chicago Undergraduate Division at Navy Pier, and teaches American history. He has written books on Lincoln's Congressional career. He has done extensive

work in studying and determining the textual history of the New Testament which included comparing the various Gospels' language to determine literary relationships. In Dr. Riddle's opinion, defendant's article is a literary copying of the Eisenschiml books here in question.

Dr. Ernest Samuels is a professor of English at Northwestern University. He has served as editorial adviser upon matters of style and scholarship for various publishers. He has written an historical biography "The Life of Henry Adams." One of his duties at the University has been to sit as a one-man court of review when students are accused of copying their English themes. He spent seventy-five to eighty hours analyzing the three works here under consideration. His opinion was that Millard's article was an independent literary creation.

Plaintiff insists Millard's article is a slavish imitation, paraphrase and copy of substantial portions of his two copyrighted books, and that defendant, through Millard, substantially appropriated his research. Eisenschiml claims that Millard's article contains substantially the same treatment of and language about Stanton, Lincoln, the Grants, John F. Parker, O'Beirne, Miss Harris and Major Rathbone, John Fletcher and Atzerodt as in the Eisenschiml books, and that said named persons are the principal characters in the Millard article as in the infringed portion of the Eisenschiml books. Plaintiff contends that Millard's article follows the same general outline or pattern as the plaintiff's two books, and that he treats the material therein in the same manner as does plaintiff.

Plaintiff insists Millard's article not only pirated the underlying theme of plaintiff's books,—the theme that Secretary of War Stanton may have been implicated in the assassination, that obstacles were deliberately placed

in the way of Booth's capture, and that there are other unexplained mysteries — but the article treats the ideas, characters, scenes and events in the same way that plaintiff does. Plaintiff further states Millard's article so parallels and simulates plaintiff's two books that the article is actually a condensation of several chapters of Why with portions taken from Shadow plus some standard historical data.

Exhibit 7 received by the Master contained what plaintiff claimed were sixty-six parallels or quotes designed to show copying and paraphrasing by Millard of plaintiff's two books. The limitation of space will not permit more than a brief illustration of the quotes.

At page 56 of Why, plaintiff wrote: "In his memoirs, Grant passed over this episode quickly and skillfully * * *." Millard, referring to the same matter, wrote "In his memoirs, Grant skillfully slid over the incident * * *."

At page 73 of Why, plaintiff wrote: "* * * L. A. Gobright, agent of the Associated Press at the Capitol * * * was about to close his office * * * when he was informed of the tragedy. Rushing to the telegraph office, he sent a short special * * * he tore over to Ford's Theatre * * * and was fortunate enough to find Booth's derringer on the floor." Millard wrote: "One L. A. Gobright of the Associated Press was just closing his Washington Office when the terrible news came. Rushing out, he quickly wired his paper * * * From there, Gobright hurried to Ford's Theatre for more details. He was in the blood-spattered box when the man named Kent found the derringer on the floor."

In Why, at page 120, plaintiff quoted from the O'Beirne diary. The O'Beirne papers were in plaintiff's exclusive possession. Millard quoted exactly the same passage. The

comments following this quotation were as follows: Plaintiff said: "That close O'Beirne came to getting his man." Millard wrote: "That close O'Beirne came to making the capture then."

In Shadow, plaintiff wrote at page 55: "What can be the meaning of this? A dying man hears his name mentioned. He opens his eyes and acts surprised." Millard wrote: "Would a dying man be surprised at hearing his own name spoken?",

On page 71 of Shadow, plaintiff wrote: (Baker) smiled, and said "I intended to have his body, dead or alive, or a mighty good substitute for it." Millard wrote: "* * * Baker, grinning harshly, would soon be remarking to a friend, 'I intended to have his body, dead or alive, or a mighty good substitute for it.'"

In Why, at page 29, plaintiff refers to "The great scoop of the century * * *." Millard refers to the same subject matter as "The newsbeat of the century * * *."

On page 419 in Why, plaintiff wrote: "Mrs. Lincoln, frightened and distracted, had fallen to the floor in a faint. A sudden rage possessed Stanton. Brutally he gave orders to take 'that woman' out of the room and not to let her come back." Millard wrote: "When Mrs. Lincoln, half mad with grief and shock, fainted at the sight of her husband, Stanton waved his arms, bawling, 'Take that woman out of here.' Get her out and don't let her come back!'"

Items in the career of the dissolute policeman, John Parker, who was Lincoln's bodyguard on the fatal night, were assembled by plaintiff from private papers of a Provost Marshal named O'Beirne, and from old and scattered records and archives of the Washington, D. C. police department. Millard could not have examined the

O'Beirne files as they were in plaintiff's possession. It is admitted Millard did not examine the Washington police files.

The Parker story is an important part of Millard's article. When Carl Sandburg was writing "Abraham Lincoln, the War Years" he requested and received permission from plaintiff to incorporate the Parker story in his work. In his foreword in Volume I he wrote: "The liberal researches of Otto Eisenschiml on the closing scenes of Lincoln's life are a distinct contribution; * * *"

Millard claims he received part of the Parker story from Sandburg's work. However, there are some parts used by Millard that were not used by Sandburg. The incident of the squawking ducks on the street car; the incident of Parker firing a pistol through a window of a house of ill fame; and the incident of Parker being severely kicked and injured by a man he was attempting to arrest, all of which were included in Millard's article, were not included in the Sandburg work. This information came from plaintiff's books because Millard did not examine the original police records, and they had appeared in no other book or article prior to that time.

In his testimony, Millard freely admitted that some of the material and ideas used by him in his article came from plaintiff's Why or Shadow. The following are illustrations of a number of his answers: "That, I believe, was queued to me by Dr. Eisenschiml's book"; 'Oh, I got some of it from the Eisenschiml books"; "The thought was undeniably inspired by Dr. Eisenschiml"; "The idea, I think, is an inspiration of Dr. Eisenschiml"; "The idea, I think, I can positively state, was Dr. Eisenschiml's"; "The material, I think, came from Dr. Eisenschiml."

Millard's attention was called to a portion of his manuscript and he was asked to compare same with portions

of plaintiff's Why. He testified: "It just shocks me a little. I did not get the language consciously from Dr. Eisenschiml, whether unconsciously I could not say. • • • It is not a copy, but there is a similarity there, and a rather shocking one to me."

It is apparent Millard did, to some extent, at least, use the material which resulted from plaintiff's research. In *Toksvig* v. *Bruce Publishing Company*, 181 F. 2d 664, 667, this Court said: "The question is not whether Hubbard could have obtained the same information by going to the same sources, but rather did she go to the same sources and do her own independent research? In other words, the test is whether the one charged with the infringement has made an independent production, or made a substantial and unfair use of the complainant's work. *Nutt* v. *National Institute, Inc.*, (2 Cir.) 31 F. 2d 236, 237."

But the Master and the District Court that whatever use Millard may have made of plaintiff's work is not actionable "because it was an insignificant use, a fair use or use of non-copyrightable material." The Master and the Court also found the work of Millard "is an independent literary creation based upon independent research." The District Court said: "Not only Millard's sworn word, but all the circumstances, indicate clearly that he did not copy from the plaintiff."

Rule 53(e)(2) Federal Rules of Civil Procedure provides: "In an action to be tried without a jury the Court shall accept the Master's findings of fact unless clearly erroneous." In *Ferroline Corp.* v. *General Aniline & Film Corp.*, 7 Cir., 207 F. 2d 912, at page 920 this Court said: "Findings of fact by a master are binding on the trial court unless clearly erroneous. • • • The threshold ques-

tion here then is the same as it was in the court below,—whether, as a matter of law, the master's findings of fact were clearly erroneous. • • • Neither the trial court nor this one may refuse to recognize the findings 'merely because of a difference in personal persuasion • • • or a dissatisfaction with the result reached.' "

The Master found that Millard did not copy but that he worked independently. We agree that a large portion of Millard's article resulted from his independent work. But it also is apparent, as hereinbefore indicated, that a number of extracts from plaintiff's works were used in Millard's article. "• • • an infringement is not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy. Paraphrasing is copying and an infringement, if carried to a sufficient extent." 18 C.J.C., Copyright and Literary Property, p. 217. This Court, quoting with approval from Ball on Law of Copyrights said in *Toksvig* v. *Bruce Publishing Company,* 181 F. 2d 664, at 667: "The question of infringement of copyright is not one of quantity but of quality and value."

Ideas, as such, are not protected by the law of copyright. *Holmes* v. *Hurst,* 174 U.S. 82; *Kalem Company* v. *Harper Brothers,* 222 U.S. 55. But the mode of expression used by the author can be protected. *Dymow* v. *Bolton,* 11 F. 2d 690. The association, arrangement and combination of ideas and thoughts and their form of expression may make a particular literary composition which is entitled to protection. *Holmes* v. *Hurst,* 174 U.S. 82; *Chicago Record-Herald Co.* v. *Tribune Association,* 7 Cir. 275 F. 797.

The question before us is did Millard make a substantial copy of plaintiff's books? *Mazar et al.* v. *Stein, et al.*, 347 U.S. 201, 218. We must keep in mind that copying is not necessarily a literal or exact repetition or reproduction. The answer is not entirely free from doubt. However, we have concluded, in view of the findings of the Master, and the findings in the memorandum opinion of the District Court, that Millard did not substantially copy plaintiff's books,—in other words, we conclude that the findings of fact in this respect were clearly not erroneous.

Whatever we may think of the ethics of Millard in utilizing various portions of plaintiff's works with only a scant credit reference, or the ethics of the defendant in publishing the article after first eliminating the credit reference, *we conclude in view of the findings, we must hold there was not a sufficient copying to amount to an infringement.*

The Master found that such use as Millard did make of plaintiff's books was a fair use. If so, such use was a non-infringing use. The question of a fair use usually arises in connection with scientific or other works dealing with a common subject matter. 18 C.J.S., Copyright and Literary Property, page 223. In historical writings such as the events immediately before and after President Lincoln's assassination, plaintiff and Millard were, necessarily, writing about the same personages during a very limited period of time. It is to be expected that there would result some similarity of treatment. In any event, the issue of fair use is a question of fact. *Mathews Conveyer Co.* v. *Palmer-Bee Co.*, 6 Cir., 135 F. 2d 73, 85. We cannot say that the Master's finding in this respect is clearly erroneous.

We consider the award of attorney fees by the District Court to be an abuse of discretion and entirely unwarranted. True, the Master and the District Court were of the opinion that plaintiff's case was entirely without merit. However, we have indicated our view to the contrary. We have pointed out that a very close question was involved, and we hold that plaintiff should not be assessed attorney fees for trying to protect the copyright on his books. The provision in the judgment requiring plaintiff to pay attorney fees must be eliminated. *Official Aviation Guide, Inc.* v. *American Aviation Associates, Inc., et al.*, 7 Cir., 162 F. 2d 541.

Criticism must also be made of the size of the record before the Master. In spite of repeated objections by plaintiff the time of the trial was unnecessarily prolonged.

Rule 16(c) of this Court provides: "* * * It is expected that the parties will not indulge in unnecessary or repetitious printing, having in mind the fact that the record is always available to the court for reference or examination. Infractions of this rule may be penalized by the denial or award of costs." Plaintiff's appendix contained 505 pages. Defendant filed a separate appendix containing 798 pages. Defendant's appendix contained much unnecessary and repetitious testimony. Defendant may include in its Bill of Costs the printing of only 400 pages of its separate appendix.

Modified as hereinbefore indicated, the judgment is

AFFIRMED.

SCHNACKENBERG, *Circuit Judge*, concurring in part, and dissenting in part.

I concur in Judge Duffy's opinion insofar as it disapproves the assessment of attorneys' fees against plaintiff.

Insofar as the opinion upholds the district court's finding and judgment on the merits of the case, I dissent. Even from those facts set forth in the majority opinion, it appears that the findings of the master and the district court are clearly erroneous. Rule 53(e)(2) Federal Rules of Civil Procedure. An examination of all the evidence in the record convinces me of Millard's transparent and shocking piracy of plaintiff's publications. For the wrongful and clearly established infringement, I would grant relief to this researcher and author.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Monday, August 12, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

No. 11890

OTTO EISENSCHMIL,
Plaintiff-Appellant,
vs.
FAWCETT PUBLICATIONS, INC.,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered that the petition for rehearing in this cause be, and the same is hereby denied.

This Order of denial is by Judges Duffy and Finnegan. Judge Schnackenberg voted in favor of granting petition for rehearing.

COPYRIGHT LAW OF THE UNITED STATES. (Title 17 U.S.C.).

Section 1. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish copy, and vend the copyrighted work; * * *

Section 3. The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title. * * *

Section 101. If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) To an injunction restraining such infringement;

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow

the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000, nor be less than the sum of $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him. • • •

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and

conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order. • • •

Section 112. Any court mentioned in section 1338 of Title 28 or judge thereof shall have power, upon complaint filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this title may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants. • • •

Section 116. In all actions, suits, or proceedings under this title, except when brought up or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

Section 208. The Register of Copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this title, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this title he shall make entry thereof.

Section 209. In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, * * *. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section 17 of this title, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The Register of Copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after July 1, 1909, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as *prima facie* evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 599

OTTO EISENSCHIML,
Petitioner,

vs.

FAWCETT PUBLICATIONS, INC., A CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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December, 1957.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 599.

OTTO EISENSCHIML,

Petitioner,

vs.

FAWCETT PUBLICATIONS, INC., A CORPORATION,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

The plaintiff's complaint for copyright infringement (App. 10 *et seq.*) raised the factual question of whether or not there had been a substantial copy of his two books. After issue was joined (App. 14-16), the plaintiff asked that the cause be heard by a Master in Chancery (Add. App. 10-11);[1] a reference was made over and despite the objection of defendant respondent (Add. App. 12-13).

[1] "Add. App." refers to defendant-respondent's appendix.

The Master appointed held extensive hearings receiving voluminous testimony from: the plaintiff, plaintiff's research assistant, two literary experts, and defendant's story editor. Additionally, the Master accepted in evidence some fifty exhibits, a deposition (550 pages) of respondent's author, and a deposition of respondent's Executive Vice President. After reviewing this mass of material, the Master made detailed findings of fact (App. 323-347) and concluded therefrom that the plaintiff's case "lacks any merit whatsoever." The Master found the defendant innocent of copying; he also expressly found that the facts in evidence disclosed respondent had made a "fair use" of plaintiff's works and that plaintiff had by his affirmative conduct dedicated a substantial portion of his allegedly copyrighted material to the public at large (App. 344-346).

The plaintiff filed detailed objections to the Master's report with the District Judge (App. 349-473). The Court then made a completely independent examination of the record (App. 486-491; compare 323-347) filing a separate written opinion affirming the Master in all respects (App. 486-491). He too specifically found that the plaintiff's case totally lacked merit. Appeal was then made to the Court of Appeals below. As that Court's opinion shows,[2] the sole issue presented to and determined by it was that the findings of fact were supported by the evidence in the record.[3]

[2] Pursuant to the Court's rules the Petition appends a purportedly true and correct copy of the opinion below. The petition however has italicized portions of the Court's opinion not so italicized in the official report (Compare 246 F. 2d 598, 603 with Appendix to Petition, page 11a).

[3] The briefs filed by both parties in the Court below were the maximum number of pages (75) permitted by the rules. Plaintiff's statement of facts was 17 pages and its argument of the contents and import of the record consumed practically the remainder of his brief. Respondent's brief contained a factual statement of 29 pages; its argument was also devoted primarily to the significance of the record.

The Court of Appeals after making a study of the record concluded the Master's findings were based upon the evidence and not "clearly erroneous" within the meaning of Rule 53 of the Federal Rules; the Court of Appeals' analysis, however, revealed that the factual questions petitioner presented were sufficiently close to exculpate him from paying respondent's attorney fees. An unsuccessful petition for rehearing occasioned a second reading of the record by the Court of Appeals and became the fourth analysis of the evidence now had in this cause.

ARGUMENT.

We oppose the petition for certiorari. The petitioner totally fails to demonstrate the existence of a single prerequisite for review by this Court. Instead he is here asking for another hearing upon his factual claims. The petitioner has now had four separate hearings upon the facts of the instant record; he has not and cannot show any grounds for being accorded still another determination. The petition falls precisely within this Court's long-established interdiction against reviewing *de novo* the correctness of lower tribunal findings of fact. *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338; *Timken Co.* v. *U. S.*, 341 U. S. 593. We ask that the writ not be granted.

Petitioner contends the Court should accord review here because the Court of Appeals has misapprehended Rule 53 in that it allegedly accepted the Master's findings without a thorough search and review of the record; it is urged that the Court of Appeals' purported failure to do so was "tantamount to an abdication of a judicial function." Petitioner is clearly in error as to the nature of the review below; had the Court of Appeals either blindly followed the Master or "abdicated" its judicial function it would not have determined that petitioner's claims presented close factual questions entitling him to a modification of the District Court order concerning attorney's fees. Even the dissenting opinion, so heavily cited by petitioner, in nowise takes issue with the majority's application of Rule 53 but, instead, simply differs with it on the significance of the record's contents. Petitioner's claim of an alleged misconstruction of Rule 53 is simply a vehicle for arguing the facts anew, the fashion in which he purports to demonstrate the Rule's misapplica-

tion by the Court below (Petition, p. 25, *et seq.*) clearly so reveals.

Petitioner also urges the opinion below manifests a misunderstanding of the law of "fair use" because it permitted a popular magazine to make the defense; it is urged that there is now great need for this Court to express its views upon this doctrine of copyright law.[4] The doctrine of fair use has, however, long been recognized as pertinent and appropriate to popular writings as well as to serious works. *Shapiro, Bernstein & Co.* v. *Collier & Son*, 26 U. S. Pat. Q. 40; *Broadway Music Corp.* v. *F-R Publishing Corp.*, 31 F. Supp. 817; *Karll* v. *Curtis Publishing Co.*, 39 F. Supp. 836. Holdings defining and applying the doctrine in all areas of writing are also legion: *Crume* v. *Pacific Mut. Life Ins. Co.*, 140 F. 2d 182; *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F. 2d 73; *Toksvig* v. *Bruce Pub. Co.*, 181 F. 2d 664; *Henry Holt & Co.* v. *Liggett & Myers*, 23 F. Supp. 302; Ball, *The Law of Copyright and Literary Property*, Sec. 125, and accordingly the critical need for an additional decision on the subject by the Court is not apparent and, we submit, nonexistent. Indeed, in view of the fact that the question of a fair use always hinges upon a determination of whether a particular author has been "fair" to a prior author in light of all relevant circumstances,[5] it is difficult to comprehend the basis

[4] Although the petitioner's claim for certiorari is in large part bottomed upon the Court of Appeals affirmance of the finding of fair use, it is manifest that this holding was not the sole predicate for the decision below. The Master and District Court also explicitly found that the respondent's story was not a substantial copying of petitioner's books; this finding was likewise approved and sustainable from the record.

[5] The factors taken into account in determining whether a particular author has been "fair" are succinctly set forth in *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F. 2d 73, 85:

"Fair use is to be determined by a consideration

for petitioner's claim that there is compelling necessity for a decision by this Court that respondent was here either "fair" or "unfair".

Petitioner cites two popularly written commentaries of this case as support for his request of review. The status and relevance of such authority is indeed questionable, particularly when there is absolutely no indication that the writers of either of the fragmentary commentaries possessed and read any of the instant record. So also, petitioner's concern for the possible import of his adverse decision below upon the literati is groundless. Since the instant suit was clearly decided solely upon the particular facts of this case, the holding below is of no precedent whatsoever as between subsequent copyright litigants contesting even the identical issues. Moreover, all of the three opinions below (App. 323 *et seq.*, App. 346 *et seq.*, App. to Petition 1 a *et seq.*) are in exact accord with the many decided cases that have explicitly passed upon the problem of purported infringement in writings of either history or other real life events. *International News Service* v. *Associated Press*, 248 U. S. 215, 234; *Funkhouser* v. *Loew's*, 208 F. 2d 185; *Oxford Book Co.* v. *College Entrance Book Co.*, 98 F. 2d 688, 691; *Kane* v. *Pennsylvania Broadcasting Co.*, 73 F. Supp. 307;

> of all of the evidence, and among other elements entering into the determination of the issue, are the extent and relative value of copyrighted material, and the effect upon the distribution of objects of the original work. *New York Tribune, Inc.* v. *Otis & Co.*, D. C. N. Y., 39 F. Supp. 67. Whether a particular use of a copyrighted article, without permission of the owner, is fair use, depends upon the circumstances of the particular case and *the court must look to the nature and objects of the selections made, the quantity and value of material used, and the degree in which the use may prejudice the sale, diminish the profits, or supersede the objects of the original work. Karll* v. *Curtis Pub. Co.*, D. C. Wis., 39 F. Supp. 836." (Italics ours.)

Collins v. *M. G. M.*, 106 F. 2d 83, 86; *Seltzer* v. *Sunbrock*, 22 F. Supp. 621. See also *Decks* v. *Wells*, 1 Dom. Law Rep. 353. The suggestion that the literary world has particular concern with the decision below is thus without foundation and is, we submit, simply a reflection of petitioner's labored searching for some ground upon which to base his plaint for certiorari.

Conclusion.

We believe the petition has clearly not presented any accepted or adequate basis for the granting of certiorari. We respectfully request the petition be denied.

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December, 1957.